DOCKET

o. 83-1620-ASX
Status: GRANTED

Title: First National Bank of Atlanta, etc., Appellant
v.
Bartow County Board of Tax Assessors, et al.

Docketed:
April 3, 1984

Court: Supreme Court of Georgia

Counsel for appellant: Newton Jr., Lee Trammell

Counsel for appellee: Pratt, James C.

ntry	Date	Note	Proceedings and Orders
1	Apr 3 1984	G	Statement as to jurisdiction filed.
2	May 3 1984		Brief amicus curiae of American Bank & Trust Co. filed.
3	May 3 1984		Brief amicus curiae of United States filed.
4	May 4 1984		Motion of appellees Bartow County Bd. of Tax Assessors, et al. to dismiss filed.
5	May 8 1984		DISTRIBUTED. May 24, 1984
6	May 29 1984		PROBABLE JURISDICTION NOTED.
			**********
7	Jun 6 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
8	Jun 18 1984		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
9	Jul 13 1984		Joint appendix filed.
10	Jul 13 1984		Brief of appellant First Natl. Bank of Atlanta filed.
11	Jul 14 1984		Brief amicus curiae of United States filed.
12	Jul 16 1984		Brief amicus curiae of Am. Bank & Trust Co, et al. filed.
13	Aug 10 1984		Brief amicus curiae of Dallas, TX, et al. filed.
14	Aug 10 1984		Brief amicus curiae of Virginia Bankers Assn. filed.
15	Aug 13 1984		Brief amicus curiae of Pennsylvania Bankers Assoc. filed.
16	Aug 15 1984		Brief amicus curiae of Pennsylvania filed.
17	Aug 15 1984		Brief amicus curiae of Citizens and Southern National Bank filed.
18	Aug 15 1984		Brief of appellees Bartow County Bd. of Tax Assessors, et al. filed.
20	Aug 17 1984		Record filed.
21	Aug 21 1984		CIRCULATED.
22	Aug 23 1984		SET FOR ARGUMENT. Tuesday, October 30, 1984. (3rd case)
23	Oct 23 1984	X	Reply brief of appellant First Natl. Bk. of Atlanta filed.
24	Oct 30 1984		ARGUED.

JURISDICTIONAL

STATEMENT

83 - 1620

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

JURISDICTIONAL STATEMENT

CHARLES T. ZINK
LEE TRAMMELL NEWTON, JR.*
**Counsel of Record for*
Appellant
HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
404/581-8000

Of Counsel:
CHARLES W. MCGRADY
The First National Bank
of Atlanta
P. O. Box 4148
Atlanta, Georgia 30302

April 3, 1984

59 pp

QUESTION PRESENTED

Whether Rev. Stat. § 3701, which forbids "every form of [state] taxation that would require that . . . [federal] obligations . . . be considered, directly or indirectly, in the computation of the tax," is violated by a state bank share tax measured by a bank's net worth (*i.e.*, its assets, including federal obligations in full, less its liabilities) minus its separately taxed real estate and only a proportion of the federal obligations held as assets by the bank?

PARTIES

The judgment and decision from which this appeal is taken were entered in three cases which were consolidated for appeal by the Supreme Court of Georgia. First National Bank of Cartersville, Georgia, the appellant in Case No. 37870 in the Supreme Court of Georgia, merged with The First National Bank of Atlanta,[1] the named appellant here, during the pendency of the appeal below. The appellees below were Bartow County Board of Tax Assessors and W. E. Strickland as State Revenue Commissioner. W. E. Strickland has since been succeeded in office by Marcus Collins. The appellees named here are therefore Bartow County Board of Tax Assessors and Marcus Collins as State Revenue Commissioner.[2]

---

[1] The First National Bank of Atlanta is a wholly owned subsidiary of First Atlanta Corporation. First Atlanta Corporation has no subsidiaries or affiliates other than its wholly owned subsidiaries, and The First National Bank of Atlanta has no subsidiaries or affiliates, other than its wholly owned subsidiaries and the wholly owned subsidiaries of First Atlanta Corporation.

[2] The parties to the other two cases below were Bartow County Bank, as appellant in Case No. 37868 below, and Citizens & Southern Bank of Bartow County, as appellant in Case No. 37869 below. Citizens & Southern Bank of Bartow County merged with Citizens and Southern National Bank, a subsidiary of Citizens and Southern Georgia Corporation, during the pendency of the appeal below. The appellees in both those cases were Bartow County Board of Tax Assessors and W. E. Strickland (succeeded in office by Marcus Collins) as State Revenue Commissioner.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutes Involved	3
Statement of the Case	4
The Question Is Substantial	5
A. Resolution of the Question Is of Vital Importance to the United States Government, to the Banking Community, and to the States' Taxing Authorities	6
B. The Georgia Bank Share Tax as Now Construed Violates the Plain Meaning of Rev. Stat. § 3701	11
C. This Court's Previous Decisions Have Rejected a Proportionate Deduction Theory	14
D. The Court Below Erred in Relying on United States v. Atlas Life Insurance Co.	17
E. The Decision Below Uses an Arbitrary Theory to Evade the Prohibition of Rev. Stat. § 3701	20
Conclusion	22
Appendix	
Opinion of the Supreme Court of Georgia, Jan. 4, 1984	A-1
Order of the United States Supreme Court, July 6, 1983	A-9
Prior Opinion of the Supreme Court of Georgia, Jan. 6, 1982	A-10
Notices of Appeal	A-24, 25
Georgia Bank Share Tax Act	A-26

TABLE OF AUTHORITIES

Cases

	Page
American Bank & Trust Co. v. Dallas County, 103 S.Ct. 3369 (1983)	passim
Bartow County Bank v. Bartow County Board of Tax Assessors, 103 S.Ct. 3563 (1983)	1, 5, 6, 13
Bartow County Bank v. Bartow County Board of Tax Assessors, 248 Ga. 703, 285 S.E.2d 920 (1982)	1, 4
Bartow County Bank v. Bartow County Board of Tax Assessors, 251 Ga. 831, ____ S.E.2d ____ (1984)	passim
Brady v. Maryland, 373 U.S. 83 (1963)	3
City of Waco v. Amicable Life Insurance Co., 230 S.W. 698 (Tex.Civ.App. — Austin 1921), *aff'd*, 248 S.W. 332 (Tex. Comm'n App. 1923, judgmt adopted)	14
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	2
Dale National Bank v. Commonwealth, 465 A.2d 965 (Pa. 1983)	7
Des Moines National Bank v. Fairweather, 263 U.S. 103 (1923)	18
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)	9
Memphis Bank & Trust Co. v. Garner, 103 S.Ct. 692 (1983)	6, 7
Mills v. Alabama, 384 U.S. 214 (1966)	2
Missouri ex rel. *Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930)	15
New Jersey Realty Title Insurance Co. v. Division of Tax Appeals, 338 U.S. 665 (1950)	10
Packard Motor Car Co. v. City of Detroit, 232 Mich. 245, 205 N.W. 106 (1925)	14
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945)	3

TABLE OF AUTHORITIES — (Continued)

	Page
Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981)	9
Schuylkill Trust Co. v. Pennsylvania, 296 U.S. 113 (1935)	6, 15-17
Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506 (1938)	16
Smith v. Davis, 323 U.S. 111 (1944)	10, 12
Stephenson & Potter v. Glander, 67 N.E.2d 14 (Ohio Bd. Tax App. 1946)	14
Taylor v. Martin, 330 F.Supp. 85 (N.D. Cal.), *aff'd without opinion*, 404 U.S. 980 (1971)	20
United States v. Atlas Life Insurance Co., 381 U.S. 233 (1965)	6, 15, 17-19
Van Allen v. Assessors, 70 U.S. (3 Wall.) 573 (1866)	16
Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829)	9, 12

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 2	10, 12
U.S. Const. art. VI, cl. 2	10, 12

Statutes

Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105(a), 73 Stat. 622	12
GA. CODE ANN. § 91A-3301 (1980)	3, 4
Ga. L. 1983, p. 1350, § 5, O.C.G.A. § 48-6-90 (Supp. 1983)	3
Life Insurance Company Income Tax Act of 1959, Pub. L. No. 86-69, 73 Stat. 112 (codified at 26 U.S.C. §§ 801-820)	17-19
Rev. Stat. § 3701	passim
26 U.S.C. § 804	18
28 U.S.C. § 1257(2)	2
28 U.S.C. § 1341	9

TABLE OF AUTHORITIES — (Continued)

	Page
31 U.S.C. § 742	5, 12
31 U.S.C. § 3124	3

Other Authorities

Federal Reserve Bulletin (Jan. 1982)	11
H. R. Rep. 651, 97th Cong., 2d Sess. 1 (1982)	3
Oxford English Dictionary (1961)	13
Texas House of Representatives, House Study Group Report, *The Bank-Shares Tax* (Nov. 22, 1983)	7
Webster's Collegiate Thesaurus (1976)	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

JURISDICTIONAL STATEMENT

Appellant respectfully requests that the Court note probable jurisdiction and review in full the decision and judgment of the Supreme Court of Georgia in *The First National Bank of Atlanta as successor in interest to First National Bank of Cartersville, Georgia v. Bartow County Board of Tax Assessors* (Case No. 37870), 251 Ga. 831, ____ S.E.2d ____ (1984).

OPINIONS BELOW

The decision from which this appeal is taken is reported as *Bartow County Bank v. Bartow County Board of Tax Assessors*, 251 Ga. 831, ____ S.E.2d ____ (1984), and is reproduced at Appendix A-1. A prior decision relating to the same matter is reported as *Bartow County Bank v. Bartow County Board of Tax Assessors*, 248 Ga. 703, 285 S.E.2d 920 (1982), and is reproduced at Appendix A-10. The judgment there was vacated and remanded by this Court in *Bartow County Bank v. Bartow County Board of Tax Assessors*, 103 S.Ct. 3563 (1983), reproduced at Appendix A-9.

JURISDICTION

The judgment of the court below was entered on January 4, 1984. (Appendix at A-1). Notices of appeal from that judgment were filed in the Georgia Supreme Court and in the trial court on March 2, 1984. (Appendix at A-24, 25). This appeal is being docketed in this Court within 90 days from the judgment in the court below.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2) because there has been drawn in question the validity of a state statute on the ground of its being repugnant to the laws of the United States, the decision below having been in favor of its validity.[3] The judgment of the Supreme Court of Georgia is final for the purpose of review by this Court under 28 U.S.C. § 1257(2). *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975).[4]

---

[3] In the Supreme Court of Georgia, appellant took the position that the Georgia bank share tax should have been construed so as to permit and require full exclusion of federal obligations from the bank share tax base. If the court below had so construed the state statute, the statute would have been consistent with Rev. Stat. § 3701, the controlling federal statute, and therefore valid. The Supreme Court of Georgia instead construed the state statute in a manner which, appellant contends, makes it contrary to Rev. Stat. § 3701. It is the validity of the statute as so construed that "is drawn in question . . . on the ground of its being repugnant to the . . . laws of the United States. . . ." 28 U.S.C. § 1257(2).

[4] This appeal falls within the categories of judgments described in *Cox Broadcasting* as "final" for purposes of review by this Court under 28 U.S.C. § 1257(2), even though there are further steps to be taken by a lower state court. As stipulated in the trial court, the conflict with the federal statute is the only basis the bank has for challenging the imposition of the bank share tax on federal obligations. *Cf. Mills v. Alabama*, 384 U.S. 214, 217-18 (1966). The federal issue will survive regardless of any action the trial court takes on remand because it has been instructed to proceed

(Continued on following page.)

STATUTES INVOLVED

U.S. Rev. Stat. § 3701 *(formerly at 31 U.S.C. § 742).*[5]

All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

Ga. Code Ann. § *91A-3301* (1980).[6]

Reproduced in Appendix at A-26.

(Continued from previous page.)

in a manner "not inconsistent" with the holding of the Supreme Court of Georgia that a partial or proportionate deduction is adequate to satisfy the mandate of the federal statute. *Cf. Brady v. Maryland*, 373 U.S. 83 (1963); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). This appeal is therefore properly taken from a "[f]inal" judgment of the Supreme Court of Georgia, within the meaning of 28 U.S.C. § 1257.

[5] Effective September 13, 1982, Rev. Stat. § 3701 was replaced by 31 U.S.C. § 3124. This change was part of a larger effort by Congress to "codify, and enact without substantive change" numerous provisions of title 31 of the United States Code. H.R. Rep. No. 651, 97th Cong., 2d Sess. 1 (1982). *See American Bank & Trust Co. v. Dallas County*, 103 S.Ct. 3369, 3372 n. 1 (1983). Rev. Stat. § 3701 was in effect during the tax year involved here.

[6] Effective January 1, 1984, the Georgia bank share tax law was superseded by a law that made banks "subject to all forms of state and local taxation in the same manner and to the same extent as other business corporations in Georgia." Ga. L. 1983, p. 1350, § 5; *O.C.G.A.* § 48-6-90 (Supp. 1983).

STATEMENT OF THE CASE

Appellant is the successor in interest to a bank whose shares were taxed under GA. CODE ANN. § 91A-3301 (1980). The appellees are the local taxing authority responsible for assessing and collecting the bank share tax, and the state revenue commissioner, who intervened in the courts below.

The Georgia property tax on the shares of the appellant was calculated by first determining the taxable value of the shares, and by then applying a tax rate to that tax base. That computation established the tax liability with respect to the property. At every stage of the proceedings described below, the appellant challenged the Georgia bank share tax as violating the immunity from state taxation enjoyed by federal obligations under Rev. Stat. § 3701.

On April 6, 1980, appellant filed a bank share tax return with the board of tax assessors. That return showed a "Total Capital or Net Worth" of $5,781,612, various deductions including one of $4,171,240 for the value of the appellant's federal obligations, and a resulting "Taxable Valuation of Shares" of $557,187. The appellee board of tax assessors disallowed the exclusion of federal obligations from the tax base. Thereafter the Bartow County Board of Equalization (on August 9, 1980) and the Superior Court of Bartow County, Georgia (by judgment of May 22, 1981) affirmed the disallowance of the exclusion.

On appeal to the Supreme Court of Georgia, that court held (on January 6, 1982) that the bank share tax was "not in contravention" of Rev. Stat. § 3701. *Bartow County Bank v. Bartow County Board of Tax Assessors,* 248 Ga. 703, 711, 285 S.E.2d 920, 927 (1982). (Appendix at A-10, 22).

The bank appealed that decision to this Court, and on July 6, 1983, the Court vacated the decision of the Georgia Supreme Court and remanded the case for consideration

in light of this Court's decision on the previous day in *American Bank & Trust Co. v. Dallas County,* 103 S.Ct. 3369 (1983), which held that a "property tax on bank shares, computed on the basis of the bank's net assets without any deduction for tax-exempt United States obligations held by the bank" violated Rev. Stat. § 3701. *Bartow County Bank v. Bartow County Board of Tax Assessors,* 103 S.Ct. 3563 (1983). (Appendix at A-9).

On remand, the Supreme Court of Georgia construed the Georgia bank share tax to allow and require only a proportionate deduction for federal obligations, and held further that such a proportionate deduction satisfied the requirements of Rev. Stat. § 3701, so that the bank share tax as so construed was not in conflict with federal law. *Bartow County Bank v. Bartow County Board of Tax Assessors,* 251 Ga. 831, ___ S.E.2d ___ (1984). (Appendix at A-1). This appeal is taken from that decision.

THE QUESTION IS SUBSTANTIAL

The question of exactly how, under Rev. Stat. § 3701 as amended in 1959, the states should go about eliminating federal obligations (and the income they generate) from state tax bases is one which this Court has not yet addressed. The proportionate deduction method the Georgia Supreme Court decided to employ, after remand from this Court, is being followed by taxing authorities not only in Georgia, but in other states as well. That method provides federal obligations with but very limited immunity from state taxation, and is contrary to the mandate of Rev. Stat. § 3701. This appeal provides the Court with an early opportunity to rule on the appropriateness of the method before further substantial dislocations occur in both state and federal revenues.

A. Resolution of the Question Is of Vital Importance to the United States Government, to the Banking Community, and to the States' Taxing Authorities.

The Court ruled twice in 1983 that the exemption from taxation expressed in Rev. Stat. § 3701 was to be read expansively, noting in *Memphis Bank & Trust Co. v. Garner*, 103 S.Ct. 692, 695 (1983) that the statute "establishes a broad exemption," and in *American Bank & Trust Co. v. Dallas County*, 103 S.Ct. 3369, 3374 (1983), that "[t]he exemption . . . is sweeping." During the same term, the Court also vacated the first decision of the Supreme Court of Georgia in this case, directing that court to reconsider its decision in light of the *American Bank* holding. *Bartow County Bank v. Bartow County Board of Tax Assessors*, 103 S.Ct. 3563 (1983). (Appendix at A-9). In none of these decisions, however, did the Court determine what particular method would eliminate federal obligations from consideration in computing a state tax.

On remand from this Court in the *Bartow County Bank* case, the Supreme Court of Georgia adopted a method which it ruled sufficiently removed federal obligations from the Georgia bank share tax base. Relying on *United States v. Atlas Life Insurance Co.*, 381 U.S. 233 (1965), and misreading *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935), the Georgia court held that Rev. Stat. § 3701 could be satisfied by construing the bank share tax act to allow and require a "proportionate" deduction for federal obligations from the share tax base. *Bartow County Bank v. Bartow County Board of Tax Assessors*, 251 Ga. 831, ___ S.E.2d ___ (1984). (Appendix at A-1). The taxing authorities in Texas and Tennessee, who were, respectively, the *American Bank* respondents and the *Memphis Bank* appellees, have taken similar positions, urging after

remand in those cases that a "proportionate" deduction for federal obligations or income is sufficient.[7]

---

[7]Following this court's decision in *American Bank*, Dallas County revalued bank shares based on a theory similar to the one used by the court below. The "Dallas County method deducts a *portion* of federal obligations from net assets to arrive at taxable value of the shares." Texas House of Representatives House Study Group Report, *The Bank-Shares Tax* 8 (Nov. 22, 1983). (Emphasis in original). Litigation over this method is pending. *Allied Bank of Dallas v. Appraisal Review Bd. of the Dallas County Appraisal Dist.*, No. 83-15917, 162nd District Court, Dallas County, Texas.

The Tennessee taxing authorities, after remand by this Court in *Memphis Bank*, urged that the Tennessee statute be construed to require only a partial exclusion of federal bond income from net taxable income. Supplemental Brief on Behalf of Appellant Leech (filed Dec. 5, 1983), *Memphis Bank & Trust Co. v. Garner*, Supreme Court of Tennessee at Jackson, Shelby Equity No. 9, at 17. The Tennessee Supreme Court did not resolve the question in that case, however, because the parties had stipulated in the trial court to the amount of the refund due. *Memphis Bank & Trust Co. v. Garner*, Supreme Court of Tennessee, Feb. 27, 1984, at 4.

Similarly, in Pennsylvania in connection with the Pennsylvania bank share tax and the decision in *Dale Nat'l Bank v. Commonwealth*, 465 A.2d 965 (Pa. 1983), the state argued that the Pennsylvania bank share tax when calculated on the net worth of a bank required only a partial exclusion of the bank's federal obligations. Brief for the Commonwealth of Pennsylvania (May 16, 1983), *Dale Nat'l Bank v. Commonwealth*, Supreme Court of Pennsylvania, No. 5, M.D., at 34-35. As in *Memphis Bank & Trust*, the state supreme court did not address the issue in the particular case then before it, apparently because the parties had previously stipulated the amount to be excluded. *See Dale Nat'l Bank*, 465 A.2d at 967.

The Supreme Court of Georgia gave the following illustration of how its newly created proportionate deduction was to be computed:

> Applying the proportionate deduction method to the appellant Citizens & Southern Bank of Bartow County . . ., its total assets of $20,463,522 for the year 1979 included $1,995,393 in federal securities. Thus, its federal securities represented 9.75% of its assets. Hence, 9.75% of its net worth is represented by federal securities. The bank is therefore entitled to reduce its net worth ($2,082,588) by 9.75% ($203,043) so as to remove from the tax base so much of its net worth as is represented by federal securities.

251 Ga. at 835-36. (Appendix at A-7). The deduction for federal securities for the bank used in the illustration was thus reduced from approximately $2,000,000 to about $200,000, or by a factor of almost ten. The court's reasoning was that federal obligations were required to be deducted from the tax base only "to the extent that they are represented in net worth," on the theory that "only a portion of the federal obligations are attributable to net worth." 251 Ga. at 833. (Appendix at A-4). As the numbers show, the proportionate deduction method substantially undercuts the protection of federal obligations from state taxation.

In *American Bank*, this Court ruled that a bank share tax measured by a bank's assets, including federal obligations, less liabilities, violated Rev. Stat. § 3701, as amended in 1959. The question presented in *American Bank* was important to states with bank share taxes. Those same states now require guidance from the Court as to whether there is a method, other than complete exclusion of the amount of federal obligations, by which federal obligations can be removed from consideration in computing a bank

share tax base. Unless the Court decides the question presented, each of the states alone will have to determine the impact of Rev. Stat. § 3701, and those determinations will be made without the guidance of any federal decision because the United States district courts are effectively precluded from addressing this federal question. 28 U.S.C. § 1341; *see generally, Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). A ruling on this appeal would be dispositive in states which have similar taxes, and will thus provide those states with authoritative interpretation of the 1959 amendment to Rev. Stat. § 3701.

A determination by this Court of the validity of the proportionate deduction method is of further importance because applicability of the method would not necessarily be limited to property taxes, but could readily be extended to include income and other forms of taxes. Under the rationale of the decision below, for example, the State of Georgia would no longer be required to allow a complete exclusion of income from federal obligations in determining its state income tax, but would be permitted to allow only a proportionate deduction of such income, with the deduction determined by reference to some ratio of tax-exempt income to total income.[8] The validity of any such dramatic change should be examined by this Court.

While a resolution of this federal question is of substantial importance to the states and to their taxpayers, it is also important to the federal government. Federal obligations are immune from state taxation because the "power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). This immunity prevents states from interfering with the federal government's power to borrow money to operate the government. *Weston v. City Council of Charleston*, 27 U.S.

---

[8] This position has already been taken by Tennessee taxing authorities. *See* note 7 above.

(2 Pet.) 449 (1829); U.S. Const. art. I, § 8, cl.2; U.S. Const. art. VI, cl. 2. It is designed "to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665, 675 (1950) (quoting *Smith v. Davis*, 323 U.S. 111, 117 (1944)).[9]

The continuing taxation of a proportion of federal obligations is menacing to the borrowing needs of the federal government because banks traditionally have been large holders of federal obligations. In 1982 banks nationwide held over 115 billion dollars in United States Treasury obli-

[9] Under the Georgia bank share tax, as now construed by the Georgia Supreme Court, the investment attractiveness of federal obligations would vary with the bank's ratio of federal obligations to total assets. The investment attractiveness of a federal obligation should vary with its effective yield. Under the lower court's formula, however, its yield varies with a bank's ratio of federal obligations to total assets. The formula of the court below is as follows: Tax Base = Net Worth − [(Federal Obligations ÷ Total Assets) × Net Worth]. For example, consider three banks, each with a net worth of $100,000 and with assets, respectively, of $500,000, $1,000,000, and $1,500,000. If each bank purchases a $10,000 Treasury bond out of cash, the effective yield on that bond will depend solely (assuming a constant tax rate) on the amount of that bank's total assets. The formula used by the court below would produce deductions on account of the Treasury bond of $2,000, $1,000 and $667, respectively, for the three banks. The value and investment attractiveness of the bonds is therefore less for the bank with $1,500,000 in assets than it is for the bank with $500,000 in assets. Moreover, on the day a bank considers investing in the $10,000 Treasury bond, it cannot determine what its after-tax yield will be because it does not know what its balance sheet will look like on tax day. A future net increase in deposits would, for example, reduce the effective yield on the $10,000 bond.

gations alone. *Federal Reserve Bulletin*, at A-32 (Jan. 1982). A tax which considers federal obligations impinges on banks by reducing the yield of those obligations and thus discourages banks from purchasing federal obligations. Because such a tax makes competing investments more attractive to banks, it unlawfully hinders the federal government's ability to borrow money.[10]

The timely resolution of this issue is as vital to the United States government and the national economy as it is to the banking community and the state taxing authorities. The question presented is an important one on which the Court should rule.

B. The Georgia Bank Share Tax as Now Construed Violates the Plain Meaning of Rev. Stat. § 3701.

Until 1959, Rev. Stat. § 3701 provided:

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

[10] The impact of the tax involved here upon federal obligations is similar to the impact of the tax involved in *American Bank*. In that case, the United States as amicus curiae stated:

> The Treasury Department advises us that resolution of this issue will have a significant impact upon the borrowing power of the United States. If the decision of the Texas court of appeals is followed elsewhere, as it has been in Georgia, such taxes will effectively reduce the yield of federal obligations, and make them less attractive investments for banks and their shareholders.

Brief for the United States as Amicus Curiae (filed Sept. 1982) at 7.

As it then read,[11] Rev. Stat. § 3701 reflected "the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *Smith v. Davis*, 323 U.S. 111, 117 (1944).

Rev. Stat. § 3701 was amended in 1959 to provide that the immunity of federal obligations from state or local tax:

> extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax ....

Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105(a), 73 Stat. 622. As this Court held in *American Bank*, "the [1959] amendment abolished the formalistic inquiry whether the tax is *on* a distinct interest, and replaced it with the inquiry whether 'computation of the tax' requires consideration of federal obligations." 103 S.Ct. at 3377. (Emphasis in original).

Appellant contends that the proportionate deduction method adopted by the Supreme Court of Georgia is inconsistent with the command of Rev. Stat. § 3701, as amended. That method employs a "formalistic inquiry whether the tax is *on*" federal obligations, the approach rejected by this Court in *American Bank*, and plainly considers federal obligations "in the computation of the tax," as forbidden by the statute.

---

[11] In *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449 (1829), the Court held a state could not impose a property tax on obligations of the United States. This rule was designed to protect the borrowing power of the federal government, and was derived from the Borrowing clause and the Supremacy clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 2 and art. VI, cl. 2. This rule was later embodied in a succession of federal statutes ultimately resulting in the pre-1959 version of Rev. Stat. § 3701. In 1926 it was published in the United States Code as 31 U.S.C. § 742.

In *American Bank*, this Court defined "considered" in this statute to mean "taken into account" or "included in the accounting". 103 S.Ct. at 3374. The Court recognized that this term was used with its ordinary meaning in the statute. Thus, Rev. Stat. § 3701 forbids all state taxes that take into account federal obligations in their computation. As a result, states are required to exclude or eliminate federal obligations when computing a state tax.[12]

The very example used by the court below to illustrate its taxing method (quoted at p. 8 above) demonstrates that the Georgia bank share tax, as now construed, does not exclude or eliminate federal obligations.[13] The value of a bank's federal obligations are added in once in computing total assets; they are taken into account a second time as the numerator of the fraction used to determine the proportion; and they are included a third time as a necessary component of the net worth to which the fraction is applied. *Bartow County Bank v. Bartow County Board of Tax Assessors*, 251 Ga. at 835-36. (Appendix at A-7). The calculation the Supreme Court of Georgia requires to be made thus "takes into account, at least indirectly, the federal obligations that constitute a part of the bank's assets." *American Bank*, 103 S.Ct. at 3374. The only manner in which federal obligations may be eliminated from consideration in computing the tax base is to exclude them from total assets *before* determining net assets.

---

[12] Webster's Collegiate Thesaurus 306 (1976) defines "exclude" and "eliminate" as synonyms and defines "exclude" to mean "to prevent ... consideration ... of". *Accord*, Oxford English Dictionary 382-83 (1961).

[13] Indeed, this Court observed in *American Bank* that Georgia was among those states whose bank share taxes at the time "explicitly required that the share's value be determined according to the value of the bank's assets." 103 S.Ct. at 3375 n. 9.

The plain language of the 1959 amendment to Rev. Stat. § 3701 forbids the tax computed by the court below. The statute requires that the federal obligations be excluded from total assets before determining th net worth tax base.

C. This Court's Previous Decisions Have Rejected a Proportionate Deduction Theory.

This Court has held twice (including once with respect to the pre-1959 version of Rev. Stat. § 3701) that a proportionate deduction is insufficient to eliminate an asset from a net worth tax base in the face of a federal statute prohibiting taxation of the asset.[14]

---

[14] Several state court decisions prior to 1959, also recognized that in order to maintain the exemption to be enjoyed by federal obligations, taxing authorities had to exclude them from total assets prior to determining net taxable values. In *Packard Motor Car Co. v. City of Detroit*, 232 Mich. 245, 205 N.W. 106, 107 (1925), for example, the Michigan Supreme Court held that a proportionate deduction formula was invalid because federal obligations "must be treated as nonexistent . . .[and] may not be *considered* at all by assessing officers in the matter of determining a property tax, and they are *considered* when used as a factor in apportioning the right to set off unconditional obligations against taxable property." (Emphasis added). Similarly, in *City of Waco v. Amicable Life Ins. Co.*, 230 S.W. 698, 703 (Tex.Civ.App. – Austin 1921), the court held that the effect of Rev. Stat. § 3701 "must be that in any scheme of state or municipal taxation [federal obligations] must be *eliminated from consideration* in any equation to reach the taxable property . . . ." (Emphasis added). The Texas Commission of Appeals affirmed this result, holding that "in determining the total assets of the company *no account can be taken* of the government tax-free securities." 248 S.W. 332, 336 (Tex.Comm'n App. 1923, judgmt adopted). (Emphasis added). More recently, a court held in *Stephenson & Potter v. Glander*, 67 N.E.2d 14 (Ohio Bd. Tax App. 1946), that a proportionate deduction of federal obligations in computing a state property tax on net worth vio-

(Continued on following page.)

In *Missouri* ex rel. *Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930), the Court examined a state property tax imposed on insurance companies, with the tax base measured by net assets (exclusive of real estate), less the sum of reserves and unpaid claims. The Supreme Court of Missouri had construed the tax to require that when an insurance company owned federal obligations, the federal obligations were to be subtracted from assets, but that the amount subtracted from the assets as reserves and unpaid claims was also to be "reduced by the proportion that the value of the United States bonds bears to total assets." *Id.* at 321. The tax was challenged in this Court as violating the U.S. Constitution and the pre-1959 version of Rev. Stat. § 3701. The Court held that the proportionate formula was invalid because "the value of the appellant's government bonds was *not disregarded* in making up the estimate of taxable net values." *Id.* at 322. (Emphasis added).[15]

In *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935), the Court determined that the shares of a national bank, which had already been the subject of a share tax imposed on a trust company as a shareholder in the national bank, had to be eliminated from the net worth tax base for another share tax imposed on the shareholders of

---

(Continued from previous page.)

lated Rev. Stat. § 3701 because part of the value of the obligations was the subject of the tax.

[15] The appellee taxing authorities argued in the court below that *Gehner* had been repudiated by *United States v. Atlas Life Ins. Co.*, 381 U.S. 233 (1965). As is discussed at note 17 below, *Atlas Life* qualified *Gehner* to the extent that *Gehner* purported to rest on constitutional principles, but preserved the holding of *Gehner* insofar as it was based on the pre-1959 version of Rev. Stat. § 3701. *See Atlas Life*, 381 U.S. at 245 n. 16.

the trust company. The Court determined that a proportionate deduction for those shares (described, 296 U.S. at 117) from the trust company share tax base was not sufficient to accomplish the required elimination, commenting that "[i]t is indisputable that the shares of stock of the [national bank] owned by the [trust company] were included in the base or measure of the tax" on the trust company's shareholders, notwithstanding the proportionate deduction. *Id.* at 120-21.

The Supreme Court of Georgia mistakenly concluded that in *Schuylkill Trust Co.* the "National Bank shares had been afforded no deduction at all" rather than the proportionate deduction they were in fact allowed.[18] *Bartow County Bank v. Bartow County Board of Tax Assessors*, 251 Ga. at 835. (Appendix at A-7). It is clear from this Court's opinion, however, that the Court was considering the trust company's complaint in the Pennsylvania trial court that "whereas there should have been a flat deduction of all shares . . . , shares of the [national bank] were included in shares granted only a proportional deduction." *Schuylkill Trust Co.*, 296 U.S. at 121-22.

---

[18]In the Supreme Court of Georgia, the appellees acknowledged that this Court had disapproved a proportionate deduction in *Schuylkill Trust Co.* Brief Of Appellee Taxing Authorities On The Question Of Remedy, filed Nov. 4, 1983, at 9-10. The *Schuylkill Trust Co.* cases [296 U.S. 113 (1935); 302 U.S. 506 (1938)] are potentially confusing because they approved taxation of federal obligations under the rule of *Van Allen v. Assessors*, 70 U.S. (3 Wall.) 573 (1866). The holdings of the *Schuylkill Trust Co.* cases permitting indirect taxation of federal obligations through a net worth levy on trust company shareholders were effectively overruled by the 1959 amendment to Rev. Stat. § 3701. *See American Bank*, 103 S.Ct. at 3377. It is the tax treatment of national bank shares in the *Schuylkill Trust Co.* case, not the tax treatment of the federal obligations there, that is relevant on this appeal.

If the proportionate deduction did not satisfy the tests of the statutes involved in *Gehner* and *Schuylkill Trust Co.*, then it cannot meet the test of the more expansive prohibition contained in the 1959 amendment to Rev. Stat. § 3701.

D. The Court Below Erred in Relying on United States v. Atlas Life Insurance Co.

In interpreting Rev. Stat. § 3701, the Georgia Supreme Court relied on this Court's opinion in *United States v. Atlas Life Insurance Co.*, 381 U.S. 233 (1965). *Atlas Life* involved the construction of the Life Insurance Company Income Tax Act of 1959, Pub. L. No. 86-69, 73 Stat. 112 (codified at 26 U.S.C. §§ 801-820), and found constitutional Congress' allocation of income from municipal securities between the policyholders' reserve and the insurance company itself. Reliance by the Supreme Court of Georgia on *Atlas Life* was misplaced, however, for several reasons.

This case involves, first of all, the determination of the meaning of Rev. Stat. § 3701. *Atlas Life*, by contrast, involved the reach of the *constitutional* prohibition against federal taxation of state debt. This Court's ultimate holding in *Atlas Life* was only that the constitutional doctrine of intergovernmental sovereign immunity did not extend so far as to require that a life insurance company be permitted to deduct the entire income from its holdings of municipal securities, rather than just the portion of such income as was allocated by the Life Insurance Company Income Tax Act of 1959 to the company itself.

The issue here is not the constitutional limit of a state's ability to tax federal debt, but rather the extent of a *statutory* prohibition against state taxation of federal obligations (Rev. Stat. § 3701), which is broader than the

constitutional prohibition.[17] Compare *American Bank* with *Des Moines National Bank v. Fairweather*, 263 U.S. 103 (1923).

In *Atlas Life* the Life Insurance Company Income Tax Act specified an allocation method and provided that the method was to be applied to "[t]he policyholders' share of each and every item of investment yield (including tax-exempt interest, partially tax-exempt interest, and dividends received) . . . ." 26 U.S.C. § 804(a)(1). As this Court pointed out in *Atlas Life*, Congress specifically considered the argument that the failure of the formula to assign all exempt income to the company would burden municipal debt, and decided to use the formula despite that objection. 381 U.S. at 239-43. Rev. Stat. § 3701, on the other hand, makes no reference at all to an allocation formula, and in fact forbids "every form of taxation that would require that . . . the obligations . . . be considered, directly or indirectly, in the computation of the tax. . . ." Congress' purpose in enacting that law, as this Court held in *American Bank*, was to establish a sweeping exemption for federal obligations from every form of state taxation

---

[17] In limiting the overstatement in *Gehner* of the constitutional immunity doctrine, the *Atlas Life* opinion was careful to observe that *Gehner* was also based on the pre-1959 version of the statute at issue here:

> This is true insofar as Gehner rested on the doctrine of implied constitutional immunity. The tax there was a state ad valorem property tax said to be on federal bonds and then, *as now*, a federal statute insulated such bonds from state taxation. See 73 Stat. 622, § 105(a), 31 U.S.C. § 742 (1958 ed., Supp. V).

381 U.S. at 245 n. 16. (Emphasis added). The footnote indicates that *Gehner's* disapproval of the proportionate deduction was not repudiated in *Atlas Life* insofar as *Gehner* relied on Rev. Stat. § 3701.

other than franchise and inheritance taxes. The insurance statute thus requires apportionment, while Rev. Stat. § 3701 necessarily disapproves apportionment by banning any computation that even considers federal obligations.

Atlas Life also fails to furnish a precedent for a proportionate deduction here because *Atlas Life* involved application of an *"on"* test, the very test which *American Bank* held to have been replaced by the 1959 amendment to Rev. Stat. § 3701. The issue in *Atlas Life* was whether the allocation contained in the Life Insurance Company Income Tax Act "places an impermissible tax *on* the interest earned by life insurance companies from municipal bonds. . . ." 381 U.S. at 236. (Emphasis added). The 1959 amendment to Rev. Stat. § 3701, however, "abolished the formalistic inquiry whether the tax is *on* a distinct interest, and replaced it with the inquiry whether 'computation of the tax' requires consideration of federal obligations." *American Bank*, 103 S.Ct. at 3377. (Emphasis in original).

Although the apportionment formula approved in *Atlas Life* was held not to impose a tax "on" tax-exempt obligations, this formula would not satisfy the more demanding requirement of Rev. Stat. § 3701. Indeed, the Court noted in *Atlas Life* that "[u]ndoubtedly the 1959 [Life Insurance Company Income Tax] Act *does not wholly ignore* the receipt of tax-exempt interest in arriving at taxable investment income." 381 U.S. at 251. (Emphasis added). *Atlas Life* thus indicates that federal obligations will not be "wholly ignore[d]," as Rev. Stat. § 3701 has been shown to require, unless banks are accorded an exclusion of federal obligations from total assets.

For all these reasons, the Supreme Court of Georgia erred in holding that *Atlas Life* authorized the use of a proportionate deduction under Rev. Stat. § 3701.

E. The Decision Below Uses an Arbitrary Theory to Evade the Prohibition of Rev. Stat. § 3701.

The proportionate deduction method created by the Georgia Supreme Court denies a deduction for federal obligations on the arbitrary and illogical theory that the bank's federal obligations are directly offset by its liabilities, and that deduction of the liabilities eliminates the federal obligations from consideration in the tax base. The Georgia court noted in its analysis that "[t]he nature of a balance sheet is such that so much of a bank's assets as consist of federal obligations are represented by an equivalent amount of liabilities (resulting in those assets not being taxed) and net worth (resulting in those assets being taxed)."[18] *Bartow County Bank*, 251 Ga. at 833. (Appendix at A-4).

---

[18] The lower court left open the possibility that "those banks which can prove that federal obligations were actually purchased from capital stock or surplus" might be entitled to a full exclusion from assets. *Bartow County Bank*, 251 Ga. at 834 n.3. (Appendix at A-4). The court's suggestion has no logical basis, however, because "capital stock or surplus" is a residual account, not an account that can be used like a checking account. When federal obligations are purchased, the actual bookkeeping entries are a debit to the asset account "Cash on Hand," and a credit to the asset account "Federal Obligations." Such tracing would also involve consideration of the federal obligations in the computation of the tax, the process forbidden by Rev. Stat. § 3701.

Not only does the Georgia court's suggestion not make sense under accounting principles, it is one that would impose a substantial burden if some rational means of tracing cash to "net worth" could somehow be devised. Banks handle thousands of transactions daily, commingling cash from all sources. Conditioning availability of the federal right on assuming the necessary administrative expense is improper. *Cf. Taylor v. Martin*, 330 F.Supp. 85, 91 (N.D. Cal.), *aff'd without opinion*, 404 U.S. 980 (1971) (holding invalid a state statute that "erect[ed] an unauthorized barrier to [Aid to Families with Dependent Chil-

(Continued on next page)

Most liabilities, however, patently have no relation to federal obligations — *e.g.* mortgage debt, trade payables, and the like. They are nonetheless partially attributed, by the decision below, to federal obligations. Indeed, the Georgia method allocates a portion of a bank's accrued state tax liabilities (including even bank share tax liability) to federal obligations, so that the very method that is claimed to avoid state taxation of federal obligations in fact burdens those obligations with an allocated portion of accrued state tax liabilities.

The only way in which federal obligations can be eliminated from consideration in computing a share-tax base is to eliminate and exclude the full value of those obligation before computation of the value of the shares. A valuation formula may be reasonable — whether based on a theory of net worth as in Georgia or on familiar theories such as price-earnings ratios, market trades, or others. But under Rev. Stat. § 3701, it is impermissible that any valuation formula, however reasonable, be used for the further purpose of excluding only a "reasonable" portion of federal obligations from consideration in computing the tax base. The court below not only used a valuation formula to address the issue of how much of appellant's federal obligations were to be excluded in computation of the tax; its balance-sheet analysis is even more egregious because it has virtually no basis in logic or fact.

(Continued from previous page)

dren] eligibility . . ."). The expense would also reduce the attractiveness of federal obligations as investments.

The appellant, moreover, cannot retroactively rework its 1980 books (even if it could determine how to do so) to meet a requirement first stated by the Georgia court in 1984.

The Georgia court's suggestion therefore fails to provide an alternative means of avoiding the proscription of Rev. Stat. § 3701.

CONCLUSION

For these reasons, the Court should note probable jurisdiction of this appeal.

Respectfully submitted,

CHARLES T. ZINK
LEE TRAMMELL NEWTON, JR.

HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
404/581-8000

Of Counsel:
CHARLES W. MCGRADY
The First National Bank
of Atlanta
P. O. Box 4148
Atlanta, Georgia 30302

April 3, 1984

APPENDIX

IN THE
SUPREME COURT OF GEORGIA
January 4, 1984

37868. BARTOW COUNTY BANK v. BARTOW COUNTY BOARD OF TAX ASSESSORS et al.

37869. CITIZENS & SOUTHERN BANK OF BARTOW COUNTY v. BARTOW COUNTY BOARD OF TAX ASSESSORS et al.

37870. FIRST NATIONAL BANK OF CARTERSVILLE v. BARTOW COUNTY BOARD OF TAX ASSESSORS et al.

HILL, Chief Justice.

These cases are now before us on remand from the United States Supreme Court. When these cases originally appeared before this court, we held that the Georgia bank share tax act, then Code Ann. § 91A-3301, later OCGA § 48-6-90 (repealed by Ga. L. 1983, p. 1350), was not rendered unconstitutional by the fact that it provided for taxation of bank shares based on the net worth of the bank without subtracting the value of federal securities owned by the bank. *Bartow County Bank v. Bartow County Board of Tax Assessors,* 248 Ga. 703, 711 (285 SE2d 920) (1982). An appeal was docketed in the United States Supreme Court. Id., 50 USLW 3824 (April 13, 1982).

Subsequently, the United States Supreme Court rendered its decision in American Bank &c. Co. v. Dallas County, 463 U. S. (103 SC 3369, 77 LE2d) (1983). The Court held that the Texas bank share tax, which was calculated by use of an equity capital formula,[1] violated Rev. Stat. § 3701, 31

---

[1] As described by the U. S. Supreme Court, the equity capital formula involves "determining the amount of the bank's capital assets, subtracting from that figure the bank's liabilities and the assessed value of the bank's real estate, and then dividing the result by the number of shares." Id., 103 SC at 3374 (51 USLW at 5183-5184).

USC § 742, as amended in 1959 (Pub. L. 86-346),[2] because the tax considered the value of United States obligations held by the banks. Since Rev. Stat. § 3701, 31 USC § 742, as amended, prohibits such consideration, directly or indirectly, in the computation of the tax, the state tax violated the supremacy clause. U. S. Const., Art. VI, Cl. 2. The U. S. Supreme Court then vacated the judgment in *Bartow County Bank,* supra, and remanded the case to this court for reconsideration in light of its opinion in American Bank &c. Co., supra. *Bartow County Bank,* supra, U. S. (103 SC 3563, 77 LE2d 1402) (1983).

1. As we explained in *Bartow County Bank,* supra, 248 Ga. at 704, our bank share tax "authorizes as deductions from the fair market value of the shares (net worth of the bank) real estate taxed separately, investments in subsidiary banks taxed under the act, undistributed earnings of other subsidiaries subject to Georgia corporate taxes, and reasonable capital reserves. . . . The act does not provide for deduction of U. S. government securities." Therefore, under American Bank &c. Co., supra, it is clear that Georgia's bank share tax act, like that of Texas, as the Bartow County Board of Tax Assessors and the Attorney General of the State of Georgia now concede, is unconstitutional unless it be construed so that the value of federal obligations which the banks hold not be considered, directly or indirectly, in computing the tax.

---

[2] Rev. Stat. § 3701, 31 USC § 742, as amended, provides: "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes."

While our statute admittedly does not provide by its terms for the exemption of federal obligations, neither does it expressly provide that federal obligations shall not be exempted. Prior to the United States Supreme Court decision in American Bank &c. Co., supra, we construed the statute so as not to allow such exemption on the premise, based upon U.S. Supreme Court decisions rendered prior to 1959, that such a statute would be constitutional. On remand, we must reconsider that construction in light of the decision in American Bank &c. Co., supra, that such a statute, as so construed, is now unconstitutional.

It has long been the law in Georgia "that Acts of the Legislature are not only presumed to be constitutional, but that the authority of the Courts to declare them void, will never be resorted to, except in a clear and urgent case. . ." *Boston & Gunby v. Cummins,* 16 Ga. 102, 105 (1854). Moreover, statutes are to be construed so as to be constitutional whenever possible. *Freeman v. Ryder Truck Lines,* 244 Ga. 80, 83 (259 SE2d 36) (1979). This rule is related to the rule of construction that: "In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly. . . ." OCGA § 1-3-1(a) (Code Ann. § 102-102). It follows that, because the General Assembly is presumed to intend all laws it enacts to be constitutional, the courts will choose a constitutional construction which realizes that intent. Thus we conclude that we should construe the bank share tax, if possible, so as to render it constitutional (i.e., so as to avoid violating 31 USC § 742, supra), rather than declare the entire share tax act unconstitutional. See *Columbia Bank for Cooperatives v. Blackmon,* 232 Ga. 344, 347 (206 SE2d 424) (1974); *City Council of Augusta v. Mangelly,* 243 Ga. 358, 363 (254 SE2d 315) (1979).

2.Having concluded that the banks' federal obligations cannot "be considered, directly or indirectly, in the com-

putation of the tax," 31 USC § 742, we confront the problem of how the share tax is to be calculated. The Attorney General argues for a proportionate method of deduction; e.g., determine the extent to which federal obligations are represented in the bank's assets, and then deduct the exempt federal obligations to the extent that they are represented in net worth (and by which the share tax is measured). The banks, on the other hand, argue for an absolute deduction. Alternatively put, they argue that the statutory command that federal obligations not "be considered, directly or indirectly, in the computation of the tax," means that for state tax purposes those of the bank's assets which are represented by federal obligations should be deducted in full, notwithstanding the fact that only a portion of the federal obligations are attributable to net worth. We disagree because we deal here with a value tax measured by net worth, rather than by total assets. The law commands that we exclude federal obligations from the tax base, which is to say, that we exclude federal obligations from net worth to the extent that they are represented therein.

The nature of a balance sheet is such that so much of a bank's assets as consist of federal obligations are represented by an equivalent amount of liabilities (resulting in those assets not being taxed) and net worth (resulting in those assets being taxed). Thus the proportionate deduction method, which we adopt, affords deduction of federal obligations to the full extent they are represented in net worth.[3]

The statute commands that federal obligations not be taxed directly (as in a tax assessed on a federal obligation),

[3] We need not here decide whether those banks which can prove that federal obligations were actually purchased from capital stock or surplus are entitled to an absolute deduction from assets or net worth because the banks have not as yet made such showing (other than in hypothetical examples).

or indirectly (as in a tax assessed on a share in a bank the value of which includes federal obligations). But we agree with the Attorney General that it does not mean that the value of the federal obligations need be or should be deducted in full from the bank's net worth. Rather, allowing a deduction from the bank's net worth of the percentage of assets attributable to federal obligations fully insulates the federal obligations from the tax.[4] Yet while such deduction fully insulates the federal obligations from the tax — as the law requires — it does so without insulating the bank's taxable assets at the same time. While not identical, the banks' argument is similar to that of the unsuccessful insurance company in United States v. Atlas Life Ins. Co., 381 U.S. 233, 251 (85 SC 1379, 14 LE2d 358) (1965), because it can be said of both that the argument "is tantamount to saying that those who purchase exempt securities instead of taxable ones are constitutionally entitled to reduce their tax liability and to pay less tax per *taxable* dollar than those owning no such securities." Id. at 251 (emphasis supplied).

The banks rely on two arguments: first, that the fact that under the statute the value of a bank's real estate holdings is deducted from net worth mandates identical treatment for federal obligations;[5] and second, that the opinion in Schuylkill Trust Co. v. Pennsylvania, 296 U.S. 113 (56 SC 31, 80 LE 91) (1935), stands for the proposition that a pro rata deduction will not suffice. However, neither argument is controlling.

[4] This method of ascertaining the tax is not foreclosed by American Bank &c. Co., supra. See footnote 10 of that decision.

[5] The banks presumably rely upon the deduction for real estate rather than the deduction for investments in subsidiary banks, etc., because the banks in these cases have no such investments.

Code Ann. § 91A-3301 does provide for the deduction of real estate which is taxed separately from net worth. But the fact that it does so does not mean that that is the only method which will insulate the real estate from taxation under Code Ann. § 91A-3301. Rather it is simply the method the General Assembly chose. Nor does it follow that the General Assembly would choose the same method to exempt federal obligations. The real estate deduction is only for real estate which is taxed separately; exempt federal obligations are, of course, not taxed separately.[6]

In Schuylkill Trust Co., 296 U.S. 113, supra, the Supreme Court dealt with a Pennsylvania tax statute which purported to tax the shares of trust companies rather than their corporate assets. But the act allowed the Trust Company to deduct from its net assets either directly or by means of a "proportional method of deduction" so much of its assets as were represented by shares of Pennsylvania corporations already taxed or exempt from tax. Id., 296 U.S. at 117. It did not allow a like exemption for federal obligations. Thus, by allowing certain deductions, but not federal obligations, the burden of the tax fell more heavily on the federal obligations. The Court first found that the act therefore discriminated against federal obligations, not because of the proportional method of deduction, but because of the inclusion of federal obligations in the tax base after the deduction of other securities. 296 U.S. at 120.

Next, the Court dealt with the Schuylkill Trust Company's ownership of shares of stock of the Philadelphia National Bank. These shares had already been taxed to the Trust Company. Id., 296 U.S. at 121. Pennsylvania had elected to exempt certain shares of stock of Pennsylvania corporations because they had been taxed, but it failed to

[6] See Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506, 514 (58 SC 295, 82 LE 392) (1938).

exempt shares of the Philadelphia National Bank which also had been taxed. The Court held that the state was bound to exempt National Bank shares. 296 U.S. at 123. The Court did not focus on the proportional method of deduction (other than to find that the question as to the National Bank shares had been raised for its review).

The banks argue that the Schuylkill Trust decision is controlling because the National Bank shares had been afforded proportionate deduction treatment and this was disallowed by the Court. On the contrary, the National Bank shares had been afforded no deduction at all. See Commonwealth v. Schuylkill Trust Co., 315 Pa. 429 (173 A. 309, 310) (1934), reversed, 296 U.S. 113 (1935); Schuylkill Trust Co. v. Pennsylvania, 302 U.S. 506, 509 (58 SC 295, 82 LE 392) (1938).

Applying the proportionate deduction method to the appellant Citizens and Southern Bank of Bartow County (which deducted its federal securities in full), its total assets of $20,463,522 for the year 1979 included $1,995,393 in federal securities. Thus its federal securities represented 9.75% of its assets. Hence, 9.75% of its net worth is represented by federal securities. The bank therefore is entitled to reduce its net worth ($2,082,488) by 9.75% ($203,043) so as to remove from the tax base so much of its net worth as is represented by federal securities. Its deductions would then be as follows:

Deduction of federal securities	$ 203,043
Real estate taxed separately	1,284,943
Reasonable capital reserves	82,000
One-half of the principal or GHEAC loans	4,895
Total deductions	$1,574,881

Subtracting its total deductions ($1,574,881) from its net worth ($2,082,484), leaves $507,607 as the taxable share value. Dividing the taxable share value by the number of outstanding shares provides the taxable value of each share.

The foregoing computation removes from the tax base (net worth) so much of the net worth (tax base) as includes federal securities, thereby excluding, as required by 31 USC § 742, supra, such securities from consideration in the computation of the tax.

Judgment reversed. Cases remanded for further proceedings not inconsistent with this opinion. All the Justices concur, except Marshall, P. J., disqualified.

IN THE

SUPREME COURT OF THE UNITED STATES

July 6, 1983

BARTOW COUNTY BANK, et al., appellants,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS, et al.

No. 81-1834.

Appeal from the Supreme Court of Georgia.

Case below, 248 Ga. 703, 285 S.E.2d 920.

July 6, 1983. The judgment is vacated and the case is remanded to the Supreme Court of Georgia for further consideration in light of *American Bank and Trust Company v. Dallas County*, 463 U.S. , 103 S.Ct. 3369, 76 L.Ed.2d (1983).

IN THE

SUPREME COURT OF GEORGIA

January 6, 1982

37868. BARTOW COUNTY BANK v. BARTOW COUNTY BOARD OF TAX ASSESSORS et al.
37869. CITIZENS & SOUTHERN BANK OF BARTOW COUNTY v. BARTOW COUNTY BOARD OF TAX ASSESSORS et al.
37870. FIRST NATIONAL BANK OF CARTERSVILLE v. BARTOW COUNTY BOARD OF TAX ASSESSORS et al.

HILL, Presiding Justice.

This appeal raises the question of whether Georgia's bank share tax violates the supremacy clauses of the U.S. and Georgia Constitutions. U.S. Const. Art. VI, Cl. 2 (Code Ann. § 1-602); Ga. Const. Art. XI, Sec. I, Par. I (Code Ann. § 2-6801).

The question has its origin in McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 (1819), where the Supreme Court in the landmark opinion by Chief Justice John Marshall held a state tax on notes issued by a branch of the Bank of the United States to be unconstitutional, saying (4 Wheat. (17 U.S.) at 436): "[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared."

As a historical consequence of the freedom of national banks from state taxation, national banks (and to make them competitive, state banks) in Georgia pay no income taxes, pay no tangible or intangible property taxes, and

pay no franchise or business license taxes.[1] Banks are taxed on their real property, real estate transfers and sales and uses, and their stockholders are taxed on the bank's shares. It is the bank share tax which is in issue here.

The validity of a bank share tax, if not discriminatory against national banks, was upheld in Van Allen v. The Assessors, 3 Wall. (70 U.S.) 573 (1865). Our bank share tax is a tax, remitted by the bank, imposed on the value of the shares of a bank issued to its stockholders, which value includes the bank's investment in stocks and bonds of the United States. *Daniel v. Bank of Clayton County*, 154 Ga. 282 (1) (114 SE 210) (1922).

Georgia's bank share tax at present reads in pertinent part as follows, Code Ann. § 91A-3301, Ga. L. 1978, pp. 309, 523: "(a)(1) No tax shall be assessed upon the capital of banks or banking associations organized under the authority of this State or of the United States located within this State, but the shares of the stockholders of the banks or banking associations, whether resident or nonresident owners, shall be returned and taxed at their fair market value which is hereby fixed and shall be determined by adding together the amount of the capital stock, paid-in capital, appropriated retained earnings, and retained earnings as defined in the Financial Institutions Code of Georgia (Title 41A) and as shown on the unconsolidated statement of condition of the bank or banking association as of January 1 next preceding the date of making the return as required in this section and dividing the result by the number of outstanding shares, at the same rate provided by law for the taxation of tangible personal property in the hands of

[1] Code Ann. §§ 91A-3301 (d) (g), 91A-3303, 91A-3306. These exemptions from taxation were mandated by federal law up until 1968. See 12 USC § 548, as amended. See also *C. & S. Nat. Bank v. Fulton County*, 245 Ga. 441 (265 SE2d 559) (1980).

private individuals." Thus the tax is upon the bank's shareholders rather than the bank itself, although the value of those shares is based upon the capital (net worth) of the bank.

The act authorizes as deductions from the fair market value of the shares (net worth of the bank) real estate taxed separately, investments in subsidiary banks taxed under the act, undistributed earnings of other subsidiaries subject to Georgia corporate taxes, and reasonable capital reserves. Code Ann. § 91A-3301 (a) (2). The act does not provide for deduction of U.S. government securities.

The Bartow County Bank, a state bank, filed with the local taxing authorities its 1980 "Determination of Taxable Value of Bank Shares." This return showed a total capital or net worth of $902,243.85 and total deductions of $950,548.21, which reduced the taxable value of the bank's shares to zero. In making the deductions, the bank included as a deduction the net book value of bank-owned U. S. government securities in the sum of $543,800.92. The Bartow County Board of Tax Assessors disallowed this deduction and determined that the taxable value of the bank's shares therefore was $495,496.56. The bank appealed to the Bartow County Board of Tax Equalization, contending that the federal securities held by the bank were exempt from state taxation under federal law. The Board of Equalization ruled in favor of the bank, the majority of the Board finding that federal securities are not taxable. The Bartow County Board of Tax Assessors appealed the decision of the Board of Equalization to the Superior Court of Bartow County.

The C&S Bank of Bartow County, a state bank, and the First National Bank of Cartersville, a national bank, had also filed 1980 returns deducting the value of federal securities, which deductions reduced the value of C&S bank shares to zero and reduced the value of First National bank

shares to $557,187. These deductions were disallowed by the Bartow County Board of Tax Assessors and these two banks also appealed to the Board of Equalization but because different panels heard the cases, the untenable result at the Board of Equalization level was a decision in favor of the Bartow County Bank but against the other two banks.[2] The other two banks appealed to the Superior Court of Bartow County, where all three cases were consolidated and heard jointly.

The State Revenue Commissioner then moved, and over the banks' objections was allowed, to intervene. The trial judge issued a lengthy order reviewing the authorities, finding that the share tax act is not unconstitutional and concluding that the banks were not entitled to deduct the value of federal securities in determining net worth for imposition of share tax. The banks appeal.

1. The principal issue in this case is the constitutionality of Georgia's bank share tax act, Code Ann. § 91A-3301; Ga. L. 1978, pp. 309, 523, supra, which provides for the taxation of bank shares held by stockholders based on the net worth of a bank without subtracting value of federal securities owned by the bank. The banks contend that the bank share tax is in contravention of 31 USCA § 742, as amended by Pub. L. 86-346, and therefore violates the supremacy clauses of the United States Constitution and the Constitution of the State of Georgia. U.S. Const. Art. VI, Cl. 2 (Code Ann. § 1-602); Ga. Const. Art. XI, Sec. I, Par. I (Code Ann. § 2-6801).[3]

[2] Apparently the panels differed because certain Board members were disqualified in certain cases.

[3] We perceive no meaningful difference between the U. S. and Georgia Constitutions. The U. S. Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the

(Continued on following page.)

The banks contend that the tax act should be declared unconstitutional in its entirety, or that this court could render the statute constitutional by allowing banks to deduct the value of the U.S. obligations owned by the banks.[4] The Revenue Commissioner contends that the banks are seeking to obtain a double or duplicative exemption. The Commissioner argues that the shares of a bank with $1 million in capital and $1 million in deposits which loans its capital to private enterprises and purchases federal securities with the money on deposit would, if the bank's position were valid, not be subject to the tax because the federal securities would be offset against the bank's capital of $1 million which would otherwise be taxable.

As noted above, the banks contend that the share tax act violates federal law and thereby violates the supremacy clause of the Constitution. Our review involves two federal laws, 12 USC § 548 and 31 USC § 742, and their predecessors. But our first inquiry is as to the cases which were the progeny of McCulloch v. Maryland, supra.

In Osborn v. President, Directors and Co. of the Bank of U.S., 9 Wheat. (22 U.S.) 738, 868 (1824), also written by Marshall, C. J., the Court declined to overrule McCulloch v. Maryland, supra, and held a state statute levying a tax on

(Continued from previous page.)

Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Georgia Constitution provides: "The laws of general operation in this State are, first: As the Supreme law: The Constitution of the United States, the laws of the United States in pursuance thereof...."

[4] Holding the act unconstitutional in its entirety might subject the banks to income and tangible property taxes, among others. See Code Ann. § 91A-3301 (d)(g).

the Bank of the United States, a federal instrumentality, to be unconstitutional.

In Weston v. City Council of Charleston, 2 Peters (27 U.S.) 449, 469 (1829), again written by Marshall, C. J., the Court applied McCulloch v. Maryland and held a city ordinance which levied a personal property tax on bonds, notes, insurance stock, and stock issued by the United States, to be invalid as to stock of the United States.

In Bank of Commerce v. Commissioners of Taxes of the City and County of N.Y., 2 Black (67 U.S.) 620 (1862), in an opinion written by Nelson, J., the Court applied Weston v. City of Charleston, supra, and held that a state tax could not be imposed on the value of the capital of a state bank which consisted partially or entirely of stock of the United States.

In the Bank Tax Case, 2 Wallace (69 U.S.) 200 (1864), also written by Nelson, J., the Court held that the New York Legislature could not avoid Bank of Commerce v. The Commissioners of Taxes of the City and County of New York, supra, by imposing the tax "on a valuation equal to" the amount of the bank's capital stock, as opposed to the tax on the actual value of the capital stock held invalid in Bank of Commerce.

In 1862, Congress authorized the Secretary of the Treasury to issue notes and bonds, and provided that "... all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations, within the United States, shall be exempt from taxation by or under state authority." Act Feb. 25, 1862, c. 33, § 2, 12 Stat. 346. It was this act which was the forerunner of 31 USC § 742 and it was this act which was referred to by the Reporter in Van Allen v. The Assessors, supra, 578, 579. At issue directly in Van Allen was § 41 of the National

Bank Act, Act June 3, 1864, c. 106, 13 Stat. 111, which is the predecessor of 12 USC § 548, also involved in the case before us.

The National Bank Act provided for the organization of national banking associations and required that at least one-third of the capital of a national bank be invested in bonds of the United States. Section 41 of that act (as amended in 1864) provided, among other things, that the act was not to be construed to prevent "all the *shares* in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority...." Act June 3, 1864, c. 106, 13 Stat. 111. (Emphasis supplied.) New York promptly enacted a bank share tax.[5] Van Allen was a shareholder in the First National Bank of Albany and all of the capital of that bank was invested in obligations of the federal government.

In Van Allen v. The Assessors, supra, the majority opinion was written by Justice Nelson, who authored Bank of Commerce v. The Commissioners of Taxes of the City and County of New York and the Bank Tax Case, supra. The principal question decided was "... whether the State possesses the power to authorize the taxation of the shares of these national banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States?" (at p. 582). The majority found the previous bank cases (holding unconstitutional state taxes on bonds of the United States which constitute the capital of a bank) not applicable (at p. 583). The majority found that no question as to the pledged faith of the government was involved, that the authority of the states, under the act

[5] Georgia enacted its first bank share tax in 1876. Ga. L. 1876, pp. 134, 136.

of Congress, to tax the shares was a condition on the exercise of the rights and privileges conferred on national banking associations, and that the tax on the shares was not a tax on the capital of the bank invested in government securities because the corporation, not its shareholders, owned the assets of the bank (at pp. 583-584). The majority held that the state bank share tax was not unconstitutional by reason of the fact that the capital of the bank was invested in federal securities. The Court did find, however, that the New York share tax was defective in that it was imposed on shares of national banks whereas the tax on the capital of state banks necessarily exempted bonds of the United States. The Court noted that this defect could be readily remedied by the state legislatures (at p. 581) (thereby leading to state share taxes on both national and state banks).

Chief Justice Chase and Justices Wayne and Swayne dissented, saying that the tax was an indirect tax on bonds of the United States, that McCulloch v. Maryland and its progeny cited above should be applied, and that Congress did not intend by authorizing the share tax to include federal obligations.

In People v. The Commissioners, 4 Wall. (71 U.S.) 244 (1866), New York's revised bank share tax applicable to both state and national banks was upheld, with Chase, C. J., and Wayne and Swayne, JJ., dissenting.

In 1868 Congress amended the share tax provision of § 41 of the National Bank Act to provide, among other things, that "... the legislature of each State may determine and direct the manner and place of taxing all the shares of national banks located within said State...." Act Feb. 10, 1868, c. 7, 15 Stat. 34. The amendment did not exempt obligations of the United States from the share tax. That apparently ended the dispute as to the validity of

the inclusion of federal securities in the share tax because in National Bank v. Commonwealth, 9 Wall. (76 U.S.) 353 (1869), the Court in a unanimous opinion which was joined by Chase, C. J., and Swayne, J., reaffirmed the right of the states to tax bank shares even though all the bank's capital be invested in federal securities.

In 1878, when the statutes were revised, the law stood as follows: The Act of Feb. 25, 1862, c. 33, s. 2, 12 Stat. 346, and its progeny provided: "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority." R.S. § 3701 (this provision will be identified as "the exemption"). The bank share tax provision as to national banks read: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State...." R.S. § 5219 (this provision will be identified as "the authorization").

Although the tax exemption provision had been in effect when Van Allen was decided, the opinion of the Court itself did not refer to that exemption. In Cleveland Trust Co. v. Lander, 184 U.S. 111 (22 SC 394, 46 LE 456) (1902), the trust company deducted the value of its bonds of the United States in declaring the share tax authorized by R. S. § 5219, claiming the exemption of R. S. § 3701. The Court found against the trust company, saying (184 U.S. at 115): "The answer to the contention is obvious and may be brief. The contention destroys the separate individuality recognized, as we have seen, by this court, of the trust company and its shareholders, and seeks to nullify one provision of the

Revised Statutes of the United States (section 5219) by another (section 3701), between which there is no want of harmony."

In Des Moines Nat. Bank v. Fairweather, 263 U.S. 103, 114 (44 SC 23, 68 LE 191) (1923), the Court referred to the Van Allen ruling, saying it "is now settled law in this court" (citations omitted). In Society for Savings in the City of Cleveland v. Bowers, 349 U.S. 143, 148 (75 SC 607, 99 LE 950) (1955), after referring to the exemption recognized by R. S. § 3701, 31 USC § 742, the Court cited Van Allen and subsequent cases, [illegible]ring "... this exception to the general rule of immunity is firmly embedded in the law."

In the case now before us, the banks contend that the exemption of R. S. § 3701, 31 USC § 742, was extended so as to overrule Van Allen, when the exemption was amended in 1959 by addition of the following: "This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other non-property taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." 31 USC § 742, as amended by Pub. L. 86-346.

However, in 1959 when the exemption was amended, R. S. § 5219, 12 USC § 548, expressly authorized the bank share tax, which included the value of U.S. obligations. We can say with confidence that had this case arisen before the authorization of 12 USC § 548 was amended in 1969, the Supreme Court of the United States would have said: The answer to the banks' contention is obvious and may be brief. The contention destroys the separate individuality recognized, as we have seen, by the Court, of the bank and its shareholders, and seeks to nullify one provision of the statutes (R. S. § 5219; 12 USC § 548) by another (R. S.

§ 3701; 31 USC § 742), between which there is no want of harmony. Cleveland Trust Co. v. Lander, supra, 184 U.S. at 115.

The share tax authorization, 12 USC § 548, was amended in 1969 to provide simply: "For the purpose of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." Pub.L. 91-156. This amendment was intended to allow the states to tax national banks like state banks, rather than to prescribe how states could tax national banks (and state banks as well). This amendment does not prohibit bank share taxes. Bank of Texas v. Childs, 615 SW2d 810, 824-826 (Tex. Civ. App. 1981).

Since 1959, the exemption of 31 USC § 742 has read: "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes."[8]

[8] The banks insist that since the introductory clause, "Except as otherwise provided by law," does not appear in Revised Statutes § 3701 but was, instead, inserted by the codifiers of the 1926 Code, and since this section of the United States Code has not been enacted into positive law, the clause is not part of the statute. The Revenue Commissioner points out that the Supreme Court has cited 31 USC § 742, including the words "Except as

(Continued on following page.)

The banks argue that this amendment was intended to extend the exemption allowed owners of government securities to shareholders of corporations owning government securities because the share tax requires that government obligations be "considered," directly or indirectly, in the computation of the tax. The banks then argue that the first rule of statutory construction is to consider the text of the law and if the text is clear, then there is no need for construction. This overlooks the cardinal rule of statutory interpretation which is to ascertain the intent of the legislative body and when that intent is clear, to carry it into effect even though seemingly contrary to the literal sense of the terms. *Thacker v. Morris,* 196 Ga. 167, 173 (26 SE2d 329) (1943). The federal rule is the same. United States v. Amer. Trucking Assns., 310 U.S. 534, 542-544 (60 SC 1059, 84 LE 1345) (1940).

Was it the intent of Congress in enacting the 1959 amendment to the exemption of 31 USC § 742 to undo the balance finally achieved between state and national banks? Was it the intent of Congress to overrule Van Allen and 94 years of "settled law," Des Moines Bank v. Fairweather, supra, 263 U.S. 103, 114? Was it the intent of Congress to repeal an exemption which has become "firmly embedded in the law," Society for Savings in the City of Cleveland v. Bowers, supra, 349 U.S. 143? We find that

(Continued from previous page.)

otherwise provided by law," Society for Savings in the City of Cleveland v. Bowers, 349 U. S. 143, 144 (75 SC 607, 99 LE 950) (1955), and argues that these words should be given force and effect. We find it unnecessary to resolve the question because we reach the same result whether or not this statute is introduced by the "Except . . ." clause. The two provisions in issue here are in harmony, Cleveland Trust Co. v. Lander, supra, and thus there is no repeal by implication. Since here we quote USC, we include the clause in the quotation.

the existence from 1959 to 1969 of the exemption of R. S. § 3701, 31 USC § 742 as amended in 1959, side by side with the share tax authorization of R. S. § 5219, 12 USC § 548 (before the 1969 amendment), shows that Congress did not intend in 1959 to repeal the share tax authorization, including the value of government securities owned by the corporation. We agree with the reasoned conclusion of the trial judge in this case: "This court does not believe the Congress of the United States would sweep away the Van Allen rule and the bank share tax system of the various states without making a clear statement of its intention to do so."[7] This conclusion is reinforced by the legislative history of the 1959 amendment to the exemption, 31 USC § 742, as well as the 1969 amendment to the tax authorization, 12 USC § 548.[8]

We therefore hold that Georgia's bank share tax act, Code Ann. § 91A-3301, Ga. L. 1978, pp. 309, 523, which provides for taxation of bank shares based on the net worth of the bank without subtracting the value of federal securities owned by the bank, is not in contravention of 31 USC § 742 as amended in 1959 by Pub. L. 86-346, and does not violate the supremacy clause of the U.S. and Georgia Constitutions. In so doing, we follow Bank of Texas v. Childs, 615 SW2d 810, supra, and decline to follow Montana Bankers Assn. v. Montana Dept. of Revenue, 580 P2d 909 (Mont. S. Ct. 1978).

---

[7] Such wide-reaching changes as the banks urge here may be accompanied by delayed effectiveness and transition provisions. See 1969 U.S. Code Cong. & Ad. News Pt. 2, pp. 1594, 1597.

[8] The legislative history of the 1959 amendment to the exemption, 31 USC § 742, shows that its purpose was to exempt income on federal obligations from the computation of gross income in state income taxes imposed by one state. 1959 U.S. Code Cong. & Ad. News Pt. 2, pp. 2769, 2773.

2. The trial court did not abuse its discretion in allowing the State Revenue Commissioner to intervene under Code Ann. § 81A-124 (b).

3. The remaining arguments advanced by the banks and by amicus curiae comprise constitutional attacks on Code Ann. § 91A-3301 (a) (1) that were not raised in the superior court or were not enumerated as error, and therefore are not cognizable on this appeal.

Judgment affirmed. All the Justices concur, except Marshall, J., not participating.

IN THE
SUPREME COURT OF GEORGIA

March 2, 1984

THE FIRST NATIONAL BANK OF ATLANTA,
as sucessor in interest to
FIRST NATIONAL BANF OF CARTERSVILLE, GEORGIA,

Appellant,

vs.

BARTOW COUNTY BOARD OF TAX ASSESSORS, et al.,

Appellees.

Case No. 37870

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the First National Bank of Atlanta as successor in interest to First National Bank of Cartersville, Georgia, the appellant above named, hereby appeals to the Supreme Court of the United States from the decision and judgment of the Supreme Court of Georgia entered herein on January 4, 1984, after remand from the United States Supreme Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

LEE TRAMMELL NEWTON, JR.
Counsel for Appellant

OF COUNSEL:
HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
404/581-8000

Filed
March 2, 1984

IN THE SUPERIOR COURT OF BARTOW COUNTY
STATE OF GEORGIA
March 2, 1984
THE FIRST NATIONAL BANK OF
ATLANTA, as successor in
interest to FIRST NATIONAL
BANK OF CARTERSVILLE, GEORGIA,

Appellant,

vs.
BARTOW COUNTY BOARD OF TAX
ASSESSORS, ET AL.,

Appellees.

CIVIL ACTION No. 3082

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the First National Bank of Atlanta as successor in interest to First National Bank of Cartersville, Georgia, the appellant above named, hereby appeals to the Supreme Court of the United States from the decision and judgment of the Supreme Court of Georgia entered herein on January 4, 1984, after remand from the United States Supreme Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

LEE TRAMMELL NEWTON, JR.
Counsel for Appellant

OF COUNSEL:
HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
404/581-8000

Filed
March 2, 1984

GA. CODE ANN. 91A-3301. BANKS AND BANKING ASSOCIATIONS.

(a) (1) No tax shall be assessed upon the capital of banks or banking associations organized under the authority of this State or of the United States located within this State, but the shares of the stockholders of the banks or banking associations, whether resident or nonresident owners, shall be returned and taxed at their fair market value which is hereby fixed and shall be determined by adding together the amount of the capital stock, paid-in capital, appropriated retained earnings, and retained earnings as defined in the Financial Institutions Code of Georgia (Title 41A) and as shown on the unconsolidated statement of condition of the bank or banking association as of January 1 next preceding the date of making the return as required in this section and dividing the result by the number of outstanding shares, at the same rate provided by law for the taxation of tangible personal property in the hands of private individuals.

(2) Nothing in this section shall be construed to relieve a bank or banking association from the tax on real estate held or owned by it. All such real estate shall be returned at its fair market value in the county, municipality, and taxing district where the real estate is located. When real estate is fully paid for, the fair market value at which it is returned for taxation may be deducted from the fair market value of the shares of the bank and banking association. If the real estate is not fully paid for, only the value at which the equity owned by the bank or banking association in the real estate is returned for taxation shall be deducted from the fair market value of the shares of the bank or banking association. There shall also be deducted from the fair market value of the shares any portion included in the fair market value and representing:

(A) Investments in subsidiary banks which themselves are subject to the tax imposed by this section.

(B) The bank's share of undistributed earnings of such other subsidiaries subject to Georgia corporate taxes.

(C) Capital reserves to the extent that the reserves are not unreasonable.

(b) The banks or banking associations themselves shall make the returns on or before April 1 of each year of their shares and pay the taxes on the shares as provided in this section. Each bank or banking association which has no branches shall return all of the shares of all stockholders of the bank or banking association for taxation in the counties, municipalities, and districts in which the bank or banking association is located. Each bank or banking association which has branches shall return for taxation in the respective counties, municipalities, and districts in which the bank or banking association and its branches are located such proportion of the shares of all stockholders of the bank or banking association as the total deposits on January 1 of each year originating in accounts attributable to each of all such branches and the main office bear to the grand total of all deposits on January 1 of each tax year of the bank or banking association and shall pay to the respective counties, municipalities, and taxing districts the taxes on such proportions of the shares.

(c) At the time that a bank or banking association makes its tax returns in the counties, municipalities, and taxing districts, the bank or banking association shall file with the return a sworn statement showing the total amount of deposits of the bank or banking association on January 1 of the tax year and the amount of the deposits on January 1 of the tax year originating in accounts attributable to the main office and attributable to the branch offices

of the bank or banking association. The taxing authorities of each county, municipality, and taxing district are authorized to examine the books of the bank or banking association to determine the correctness of the sworn statement and may disallow any unreasonable unallocated reserves.

(d) Banks and trust companies doing a general banking business shall not be required to pay any State income tax, State franchise tax, or city or county business license taxes.

(e) When a bank or banking association organized under the authority of this State or of the United States located within this State owns all of the capital stock of a corporation holding, leasing, or owning premises in and on which the bank carries on its business and an ad valorem tax is levied on such real estate, the bank or banking association may deduct from the fair market value of its shares the fair market value of its equity in the real estate. The fair market value of the real estate shall be measured by the fair market value of the capital stock of the bank or banking association in the holding corporation.

(f) A transfer by a bank or banking association of deposits from one branch or office to another branch or office to secure a reduction in the rate of tax on its shares or to change the situs of taxation of any proportion of its shares shall be wholly ineffective for such purpose. The bank or banking association making any such transfer shall pay to the county, municipality, and taxing district from which the transfer was made, in addition to the tax imposed by this section, 25 per cent. of that part of the taxes on its shares which would have been avoided if the transfer had changed the situs of taxation of a proportion of its shares.

(g) No tax shall be assessed, imposed, or levied with respect to tangible personal property owned by any bank or banking association organized under the laws of this State or the United States.

(Acts 1978, pp. 309, 523, eff. Jan. 1, 1980.)

AMICUS CURIAE

BRIEF

(3)

No. 83-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

BRIEF BY PETITIONERS IN AMERICAN BANK & TRUST CO. v. DALLAS COUNTY AS AMICI CURIAE IN SUPPORT OF APPELLANT

MARVIN S. SLOMAN*
BRIAN M. LIDJI
Carrington, Coleman,
Sloman & Blumenthal
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201
(214) 698-8000
**Counsel of record*

PETER S. CHANTILIS
CECILIA H. MORGAN
Chantilis & Morgan
8150 North Central Expwy.
Dallas, Texas 75206

ROY C. COFFEE, JR.
CHRISTOPHER G. SHARP
Coffee, Coffee, & Sharp
6201 Hillcrest
Dallas, Texas 75205

BRUCE W. BOWMAN, JR.
Vial, Hamilton, Koch, Tubb & Knox
1500 RepublicBank Tower
Dallas, Texas 75201

May 3, 1984

13pp

QUESTION PRESENTED

Whether Rev. Stat. § 3701 is violated by a state bank share tax computed with only a partial deduction of the bank's federal obligations rather than a complete elimination of the value of the federal obligations from the value of the shares?

AMICI CURIAE

The following state and national banks were the petitioner banks in the case of *American Bank & Trust Co. v. Dallas County*, 103 S.Ct. 3369 (1983), and are the amici curiae here. The names in parentheses are the present names of banks that have changed the name under which they do business since the commencement of the *American Bank & Trust Co.* case.

American Bank and Trust Company (InterFirst Bank Oak Cliff)
American National Bank of Garland
Bank of Dallas
Bank of Texas
Brookhollow National Bank
Canyon Creek National Bank
Capital Bank
Century Bank and Trust Company
Citizens National Bank of Dallas (Cullen/Frost Bank of Dallas, N.A.)
Dallas International Bank
Dallas National Bank (RepublicBank Dallas East, N.A.)
Equitable Bank
First Citizens Bank
First City Bank of Dallas
First Continental Bank (Allied Bank – Southwest)
First National Bank in Dallas (InterFirst Bank Dallas, N.A.)
First National Bank in Garland (RepublicBank Garland, N.A.)
First National Bank of Lancaster
First Security Bank of Dallas, N.A. (First City Bank – Market Center, N.A.)
First Security Bank of Garland, N.A. (First City Bank of Garland, N.A.)
First Texas Bank
Garland Bank and Trust Co.
Grand Avenue Bank (Grand Bank)
Greenville Avenue Bank and Trust (RepublicBank Greenville Avenue)
Grove State Bank (InterFirst Bank Pleasant Grove)
Inwood National Bank of Dallas
Lakewood Bank and Trust Company (Allied Lakewood Bank)

Love Field National Bank
Mercantile National Bank at Dallas
Metro Bank of Dallas (Allied Bank of Dallas)
National Bank of Commerce of Dallas (BancTexas Dallas N.A.)
North Dallas Bank & Trust Co.
NorthPark National Bank of Dallas
Oak Cliff Bank and Trust Company (RepublicBank Oak Cliff)
Pan American National Bank of Dallas
Park Cities Bank (InterFirst Bank Park Cities)
Preston State Bank
Prestonwood National Bank (Texas American Bank/Prestonwood, N.A.)
Republic National Bank of Dallas (RepublicBank Dallas, N.A.)
Reunion Bank
Texas American Bank, Dallas North
Texas Commerce Bank – Campbell Centre, N.A.
Texas Commerce Bank – Casa Linda, N.A.
Texas Commerce Bank – Dallas, N.A.
Texas Commerce Bank – Garland
Texas Commerce Bank – Northwest, N.A.
Texas Commerce Bank – Park Central, N.A.
Texas Commerce Bank – Preston Royal, N.A.
Trinity National Bank of Dallas
Valley View Bank (First City Bank – Valley View)
White Rock Bank of Dallas (BancTexas White Rock)
Wynnewood Bank & Trust

The following class representatives were petitioners in *American Bank & Trust Co.* on behalf of themselves and of all the shareholders of the above listed banks as of January 1, 1980, and are amici curiae here.

Richard M. Hart
Frank Marshall
Ronald G. Steinhart
Peyton Cooper
Charles N. Brewer
Lynn D. Turner
A. A. Walker
Woodrow Brownlee

TABLE OF CONTENTS

	Page
Question Presented	i
Amici Curiae	ii
Table of Contents	iv
Table of Authorities	iv
Brief By Petitioners in American Bank & Trust Co. v. Dallas County as Amici Curiae in Support of Appellant	1
The Decision Below is Wrong	2
The Question Presented is Important to State Governments and Taxpayers	4
The Question Presented is Important to the Federal Government	7
Conclusion	8

TABLE OF AUTHORITIES

Case	
American Bank & Trust Co. v. Dallas County, 103 S.Ct. 3369 (1983)	passim
Statutes	
Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 622	2
Rev. Stat. § 3701	passim
La. Rev. Stat. Ann. § 47:1967	6
Laws of Pa., Act 1983-66	6
Other Authorities	
Texas House of Representatives, House Study Group Report, *The Bank-Shares Tax* (Nov. 22, 1983)	4
Texas Research League, Preliminary Report to the Select Committee on Fiscal Policy, *Status of the Texas Bank Shares Tax* (April 12, 1984)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

BRIEF BY PETITIONERS IN AMERICAN BANK & TRUST CO. v. DALLAS COUNTY AS AMICI CURIAE IN SUPPORT OF APPELLANT

The banks and class representatives who were petitioners in *American Bank & Trust Co. v. Dallas County,* No. 82-1717, 103 S.Ct. 3369 (1983), respectfully urge the Court to note probable jurisdiction and reverse the decision below.

The Jurisdictional Statement correctly sets forth the Opinions Below, Jurisdiction, Statutes Involved, and Statement of the Case.

THE DECISION BELOW IS WRONG

Until 1959 Rev. Stat. § 3701 provided:

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

In 1959 Congress expanded the prohibition provided by Rev. Stat. § 3701 by adding the following sentence:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax. . . .

Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 622.

The 1959 amendment was intended by Congress "to sweep away formal distinctions and to invalidate all taxes measured directly or indirectly by the value of federal obligations, except those specified in the amendment." *American Bank & Trust Co. v. Dallas County,* 103 S.Ct. at 3377.

In *American Bank & Trust Co.,* the Court defined "considered" in the statute in its ordinary sense of "taken into account" or "included in the accounting". 103 S.Ct. at 3374. Because Rev. Stat. § 3701 forbids all state taxes which take into account, directly or indirectly, the value of federal obligations, states are required to exclude and eliminate the value of federal obligations in computing local taxes.

The tax calculated by the court below excludes only a portion (less than 10%) of the bank's federal obligations, and therefore, as to the remainder of the bank's obligations, violates the clear prohibition of Rev. Stat. § 3701. As an

example, the Georgia Supreme court computed the tax as follows (Jurisdictional Statement Appendix p. A-7):

> [I]ts total assets of $20,463,522 for the year 1979 included $1,995,393 in federal securities. Thus its federal securities represented 9.75% of its assets. Hence, 9.75% of its net worth is represented by federal securities. The bank therefore is entitled to reduce its net worth ($2,082,488) by 9.75% ($203,043) so as to remove from the tax base so much of its net worth as is represented by federal securities.

The tax includes all of a bank's federal obligations in arriving at its net worth (assets less liabilities) and then reduces the bank's net worth by only a portion of its federal obligations. Such a tax plainly takes into account the remainder of the bank's federal obligations because they are "included in the accounting" of the bank's net worth that is used to value the shares and compute the tax. In assessing the tax on net-worth share-value in the instant case, the only manner in which the obligations may be eliminated from the tax base is to exclude them from gross assets before determining net worth.

The Georgia decision seductively draws the problem of avoiding consideration of federal obligations into an accounting formula used to determine share value. We assume that under state law the formula is generally appropriate for valuing shares. But it does not follow that such a formula for valuing shares may also be used to determine whether the actual share value, on which the tax is computed, directly or indirectly considers any federal obligations. The use of such formulas obscures the principle plainly instinct in the Court's *American Bank & Trust* decision, that whatever method and whatever result is involved in valuation of shares, the full amount of the bank's federal obligations must be eliminated from the

value base in order that they not be considered directly or indirectly in the computation of the tax.

The sweeping prohibitory language of Rev. Stat. § 3701 forbids any tax computed without exclusion of all federal obligations from share values. Because the Georgia tax is computed without the elimination and exclusion of the bank's federal obligations, the tax violates Rev. Stat. § 3701.

THE QUESTION PRESENTED IS IMPORTANT TO STATE GOVERNMENTS AND TAXPAYERS

Following the Court's decision in *American Bank & Trust Co. v. Dallas County*, 103 S.Ct. 3369 (1983), that case was remanded to the state court of appeals at Dallas, Texas, where the case is still pending. Dallas County has filed the decision of the Supreme Court of Georgia with the court of appeals at Dallas.

Meanwhile, taxing authorities in Texas, Louisiana and Pennsylvania (as well as Georgia) have taken the position that formulas could be used to exclude only a part of a bank's federal obligations without violating Rev. Stat. § 3701.

In Texas several formulas are being used to circumvent Rev. Stat. § 3701 and this Court's decision in *American Bank & Trust*. In Dallas County, for example, taxing authorities use a percentage formula for deduction of federal obligations that is based on the ratio of adjusted net worth to total assets. *See* Texas House of Representatives, House Study Group Report, *The Bank-Shares Tax* (Nov. 22, 1983), p. 8. This generally results in the exclusion of even a smaller amount of the bank's federal obligations than in Georgia.[1] Litigation is pending by more

[1] The amount deducted is from 2% to 8%, based on a random sampling of 1983 assessments of Dallas County banks.

than 100 banks, including these amici curiae, as to whether this formula is permitted by Rev. Stat. § 3701. *Allied Bank of Dallas, et al. v. Appraisal Review Board of the Dallas County Appraisal District, et al.*, No. 83-15917, 162nd District Court, Dallas County, Texas.

Other taxing authorities in Texas use a flat percentage of each bank's federal obligations as the amount to be excluded, and the percentage varies among those taxing authorities. Still other taxing authorities deduct only a portion of each bank's federal obligations equal to some multiple of the earnings on the bank's federal obligations.[2]

Other states with share taxes are also attempting only a partial exclusion of federal obligations in computing their bank share taxes. Following the decision in *American Bank & Trust*, Pennsylvania amended its bank share tax statute to provide that the shares be valued based on net worth

[2] Data on formulas currently in use in Texas are based on a survey of 253 Texas taxing districts, reported by the Texas Research League in its Preliminary Report to the [Texas Legislature] Select Committee on Fiscal Policy, *Status of the Texas Bank Share Tax* (April 12, 1984). Of the 174 responding tax authorities, 106 had completed valuation of their respective bank's shares. Of these, 43 eliminated federal obligations from the computation of the tax. The remainder used various formulas to arrive at partial deductions of federal obligations, but the amount excluded varies depending on the formula used by the taxing authorities: 11 used a fixed percentage deduction of federal obligations, 21 used the Georgia formula deduction of federal obligations, and 31 deducted only an amount equal to some multiple of the bank's federal obligation income. In addition, 33 taxing authorities that had not completed their valuations at the time of the survey were in the process of using one of the above mentioned formulas. Of the remaining taxing authorities, 31 plan no action until clarification of the situation.

minus only "an amount equal to the same percentage of such total [net worth] as the book value of obligations of the United States bears to the book value of the total assets." Laws of Pa., Act 1983-66.

A similar proportionate deduction is used in Louisiana where bank shares are valued based on 80% of the bank's book value and 20% of a multiple of the income of the bank. La. Rev. Stat. Ann. § 47:1967. We are advised that federal obligations are partially deducted using the Georgia method in the book value part of the computation; and in the income aspect, a partial deduction of the interest on federal obligations is based on a percentage obtained by dividing the income from federal obligations by total income. (Advice from Louisiana State Tax Commissioner's office, May 1, 1984).

These formulas may or may not be reasonable valuation formulas under state law; as valuation formulas they are not in issue here. The issue is whether — regardless of the method used to value a bank's shares — the entire value of a bank's federal obligations must necessarily be eliminated from the taxable value of the shares in order that the share value not take into account, even indirectly, the bank's federal obligations. Rev. Stat. § 3701 is not concerned with formulas. The federal concern requires the complete elimination of the value of federal obligations from the total value of the shares at some point before imposition of the tax because Rev. Stat. § 3701 forbids "all taxes measured directly or indirectly by the value of federal obligations." *American Bank & Trust Co. v. Dallas County*, 103 S.Ct. at 3377.

Rather than excluding the federal obligations, state taxing authorities use these formulas to *include* in excess of 90% of the face amount of those federal obligations. Whatever protection is afforded by Rev. Stat. § 3701 is rendered

virtually meaningless by the use of these formulas. Their use should be eliminated by this Court's guidance.

THE QUESTION PRESENTED IS IMPORTANT TO THE FEDERAL GOVERNMENT

Resolution of the question presented is also of substantial importance to the federal government. A tax that unlawfully considers federal obligations impinges on banks by reducing the yield on those obligations, and thus discourages banks from purchasing federal obligations. This in turn makes competing investments more attractive to banks and thereby unlawfully hinders the federal government's ability to borrow money.

In *American Bank & Trust* the Treasury Department stated that computation of bank share taxes as in Texas and Georgia without deduction of federal obligations "will effectively reduce the yield of federal obligations, and make them less attractive investments for banks and their shareholders." Brief for the United States as Amicus Curiae, at 7. Notwithstanding the very clear import of the Court's subsequent decision in *American Bank & Trust*, local taxing authorities are using formulas in the assessment of bank share taxes that *still* include more than 90% of the banks' federal obligations in the computation of the tax. This is scarcely even lip service to the command of Rev. Stat. § 3701 and this Court's decision in *American Bank & Trust*. As a result bank share taxes in the various states will continue to have "a significant impact upon the borrowing power of the United States." *Id.* That impact will be removed only by the elimination, rather than a partial deduction, of the full value of each bank's federal obligations from the value of its shares.

Until the Court's resolution of the question presented, the uncertainty generated by the use of these various formulas may itself have the effect of burdening the federal government's borrowing power, as the federal government competes with investments offering more certainty. The uncertainty can only be eliminated by a definitive ruling by this Court on the question presented.

CONCLUSION

The decision below violates the immunity from state taxation guaranteed by Congress in Rev. Stat. § 3701 and explained by the Court in *American Bank and Trust*. Widespread attempts to evade the plain language of Rev. Stat. § 3701 are so erroneous as to call for correction by this Court. For the foregoing reasons, and the reasons contained in the Jurisdictional Statement of Appellant, probable jurisdiction should be noted and the decision below should be reversed.

Respectfully submitted,

MARVIN S. SLOMAN
BRIAN M. LIDJI
Carrington, Coleman,
Sloman & Blumenthal
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201
(214) 698-8000

PETER S. CHANTILIS
CECILIA H. MORGAN
Chantilis & Morgan
8150 North Central Expwy.
Dallas, Texas 75206

ROY C. COFFEE, JR.
CHRISTOPHER G. SHARP
Coffee, Coffee, & Sharp
6201 Hillcrest
Dallas, Texas 75205

BRUCE W. BOWMAN, JR.
Vial, Hamilton, Koch,
Tubb & Knox
1500 RepublicBank Tower
Dallas, Texas 75201

May 3, 1984

AMICUS CURIAE

BRIEF

(4)

No. 83-1620

In the Supreme Court of the United States

OCTOBER TERM, 1983

FIRST NATIONAL BANK OF ATLANTA, ETC.,
APPELLANT

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS, ET AL.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
ERNEST J. BROWN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

12 pp

QUESTION PRESENTED

Whether the Supreme Court of Georgia erred in holding that, for purposes of computing the state tax on bank shares, measured by the bank's net worth, Rev. Stat. § 3701 (as amended in 1959) did not require that the bank's net worth be reduced by the amount of the obligations of the United States held by the bank, but rather permitted a reduction by only that fraction of the net worth that United States obligations constituted of the bank's total assets.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Opinions below	2
Jurisdiction	2
Constitutional provisions and statute involved	3
Statement	4
Discussion	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

American Bank & Trust Co. v. *Dallas County*, No. 81-1717 (July 5, 1983) 1, 3, 4, 5, 6, 7, 8
Bank of Commerce v. *New York City*, 67 U.S. (2 Black) 620 6
Bank Tax Case, 69 U.S. (2 Wall.) 200 6
New Jersey Realty Title Ins. Co. v. *Division of Tax Appeals*, 338 U.S. 665 ..... 5-6, 7
Society for Savings v. *Bowers*, 349 U.S. 143 6
United States v. *Atlas Life Ins. Co.*, 381 U.S. 233 8
Weston v. *Charleston*, 27 U.S. (2 Pet.) 449 6

Constitution and statutes:

U.S. Const.:
- Art. I, § 8, Cl. 2 3
- Art. VI, Cl. 2 3

Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124(a), 96 Stat. 945, 31 U.S.C. 3124(a) 3
Internal Revenue Code of 1954, 26 U.S.C. 804 8
Rev. Stat. § 3701 (1875 ed.), as amended by the Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105(a), 73 Stat. 622 ..... 3, 5, 6, 8
1933 Ga. Laws Pt. 91A:
- § 91A-3301(a), codified at Ga. Code Ann. § 48-6-90(a) (1982) 4
- § 91A-3301(b), codified at Ga. Code Ann. § 48-6-90(b) (1982) 4

Miscellaneous: Page

Bureau of Gov't Financial Operations, Office of the Secretary, U.S. Dep't of Treasury, *Treasury Bulletin* (1st Quarter FY 1984) 2

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1620

FIRST NATIONAL BANK OF ATLANTA, ETC.,
APPELLANT

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS, ET AL.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

After this Court's decision in *American Bank & Trust Co.* v. *Dallas County*, No. 81-1717 (July 5, 1983), in which the United States participated as amicus curiae, this case was remanded to the Supreme Court of Georgia for further consideration in light of *American Bank* (J.S. App. A9). The Georgia Supreme Court has now largely adhered to the result of its prior decision, by holding that in the imposition of the State's tax on bank shares the greater part (90.25% in an example that it em-

ployed) of the obligations of the United States held by the bank could be taken into account.

By subjecting obligations of the United States to state taxation, whether that taxation be direct or indirect, the Georgia Supreme Court's decision adds to the cost of borrowing by the United States. We are advised by the Department of the Treasury that as of December 1983, commercial banks held $188.9 billion in federal obligations.[1] If other states were to impose a tax on banks or other corporate shares similar to that upheld in this case, the United States would incur additional costs of borrowing that could amount to millions of dollars. Hence, the United States has an important interest in the outcome of this litigation.

OPINIONS BELOW

The original opinion of the Supreme Court of Georgia (J.S. App. A20-A23) is reported at 248 Ga. 703, 285 S.E.2d 920. The opinion on remand from this Court (J.S. App. A1-A8) is reported at 251 Ga. 831, 312 S.E.2d 102.

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on January 4, 1984. Notices of appeal to this Court were filed in the Supreme Court of Georgia and in the Superior Court of Bartow County on March 2, 1984 (J.S. App. A24, A25), and a jurisdictional statement was filed with this Court on April 3, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

---

[1] See Bureau of Gov't Financial Operations, Office of the Secretary, U.S. Dep't of Treasury, *Treasury Bulletin* 31 (1st Quarter FY 1984).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Constitution of the United States:

Art. I, § 8, Cl. 2:

> The Congress shall have Power * * * To borrow Money on the credit of the United States[.]

Art. VI, Cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Rev. Stat. § 3701, as amended by the Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105(a), 73 Stat. 622: [2]

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

---

[2] As noted by this Court in its *American Bank* opinion (slip op. 2 n.1), Rev. Stat. § 3701 was succeeded by 31 U.S.C. 3124(a) when Title 31 of the United States Code was enacted into positive law without substantive change on September 13, 1982, subsequent to the year here involved. Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124(a), 96 Stat. 945.

STATEMENT

The First National Bank of Cartersville, Georgia (Bank), to which appellant is the successor in interest, filed with local taxing authorities its 1980 "Determination of Taxable Value of Bank Shares," as required by 1933 Ga. Laws § 91A-3301(b), codified at Ga. Code Ann. § 48-6-90(b) (1982) (J.S. App. A27). Section 91A-3301(a) imposes upon bank shares a tax "at their fair market value, which shall be determined by adding together the amount of the capital stock, paid-in capital, appropriated retained earnings, and retained earnings as defined in Title 7" (Ga. Code Ann. § 48-6-90(a) (1982). In its 1980 return, the Bank deducted from the net worth shown in accordance with the terms of the statute the value of obligations of the United States owned by it. That deduction was disallowed by the Bartow County Board of Tax Assessors along with similar deductions by two other banks.

All three banks appealed to the Board of Equalization, which decided against the appellant Bank and (because different panels heard the cases) one of the other two banks. The three cases were consolidated on appeals to the Superior Court of Bartow County, which held that the banks could not deduct the value of federal securities in determining net worth for purposes of the share tax (J.S. App. A12-A13). The Supreme Court of Georgia affirmed (J.S. App. A10-A23). On appeals to this Court (No. 81-1834), the judgment of the Supreme Court of Georgia was vacated, and the case was remanded to that court for further consideration in light of this Court's decision in *American Bank & Trust Co.* v. *Dallas County*, No. 81-1717 (July 5, 1983) (J.S. App. A9).

Upon remand, the Supreme Court of Georgia adhered in large part, although not entirely, to its prior decision. It noted that it dealt with "a value tax measured by net worth, rather than by total assets" (J.S. App. A4). It held that Rev. Stat. § 3701, as amended, required only a proportionate deduction—*i.e.*, that net worth be reduced by that fraction that United States obligations owned by the bank constituted of the bank's total assets. Thus in the case of the Citizens and Southern Bank of Bartow County (C&S Bank), which it used as an example, since the $1,995,393 of federal securities owned by the bank were 9.75% of total assets of $20,463,522, the court held that only 9.75% of its net worth of $2,082,488 ($203,043) was represented by federal securities, and had to be deducted—not the entire $1,995,393 of United States obligations (J.S. App. A4-A7). From that decision the Bank again appeals.

DISCUSSION

On this Court's remand of this case for further consideration in light of *American Bank & Trust Co.* v. *Dallas County*, *supra*, the Georgia Supreme Court has substantially adhered to its prior position, and (contrary to the holding in *American Bank* and Rev. Stat. § 3701) has denied the complete exemption from state taxation that Congress provided for obligations of the United States.[3]

As *American Bank* pointed out (slip op. 1, 7, 9-10), this Court has long and consistently held that a tax on a corporation's net worth (*New Jersey Realty Ti-*

---

[3] The Court in *American Bank* noted that the Supreme Court of Georgia had upheld a bank share tax statute similar to the one it was invalidating (slip op. 5 n.5).

tle Ins. Co. v. *Division of Tax Appeals*, 338 U.S. 665, 672-673 (1950)), or its capital (*Bank of Commerce* v. *New York City*, 67 U.S. (2 Black) 620 (1863)), or its "'capital stock paid in * * * and * * * surplus earnings'" (*Bank Tax Case*, 69 U.S. (2 Wall.) 200, 200 (1865) (emphasis and citation omitted)) is invalid insofar as obligations of the United States are included in the computation by which the amount of the tax is ascertained. In each of those cases the Court held that the amount on which the tax is computed must be reduced by the amount of United States obligations held by the corporation. See also *Society for Savings* v. *Bowers*, 349 U.S. 143, 147-148 (1955); *Weston* v. *Charleston*, 27 U.S. (2 Pet.) 449 (1829).

Prior to 1959, however, as *American Bank* also noted (slip op. 1-2, 7-8), neither the Constitution nor Rev. Stat. § 3701 was held to prohibit a tax on the value of a corporation's shares "even though the value of that discrete interest was measured by the underlying assets, including United States obligations." This was true even though the distinction was "economically meaningless" (slip op. 2) and "rather formalistic" (*id.* at 6). See also *Society for Savings* v. *Bowers*, 349 U.S. at 148.

But in 1959 the Congress amended Rev. Stat. § 3701 by adding to the exemption of United States obligations from state and local taxes the provision that "[t]his exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax," with exceptions only for nondiscriminatory franchise or other nonproperty taxes, and for estate or inheritance taxes. Act of Sept. 22, 1959, § 105(a), 73 Stat. 622.

As the Court pointed out in *American Bank* (slip op. 5), the language of the amendment is "sweeping." "The 1959 amendment rejected and set aside this Court's rather formalistic pre-1959 approach to § 3701. * * * Under the plain language of the 1959 amendment, * * * the tax is barred regardless of its *form* if federal obligations must be considered, either directly or indirectly, in *computing* the tax" (slip op. 6 (emphasis in original)).

If the tax had been on the net worth of the banks in this case, the amount on which the tax was computed would have had to be reduced by the amount of the obligations of the United States held by the banks. *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, *supra*. So too, in computing Georgia's tax on bank shares, the value of the shares subject to tax must be ascertained by first removing from the computation all of the obligations of the United States held by the banks. To do otherwise would be to return to the pre-1959 "formal but economically meaningless distinction between taxes on government obligations and taxes on separate interests" (*American Bank*, slip op. 2).

"Section 3701 prohibits any form of tax that would require consideration of federal obligations in computing the tax; it cannot matter whether such consideration is mandated by the tax assessor in practice or by the state statute in so many words" (*American Bank*, slip op. 9 (footnote omitted)). The Supreme Court of Georgia has construed the Georgia statute to mandate, with respect to obligations of the United States held by a bank, only a proportionate reduction of the net worth on which the bank share tax is computed, *i.e.*, a reduction of net worth by only that fraction which obligations of the United States constitute of the total assets of the bank (J.S. App. A4-A5). In

the example that the court employed (*id.* at A7), where obligations of the United States represent 9.75% of the total assets of the bank, 90.25% of the obligations of the United States are taken into account in computing the tax. The decision of the Supreme Court of Georgia is therefore inconsistent with the decision of this Court in *American Bank*, and in conflict with Rev. Stat. § 3701, as amended in 1959.[4]

CONCLUSION

Probable jurisdiction should be noted and, on the authority of this Court's decision in *American Bank & Trust Co.* v. *Dallas County*, the judgment below should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
ERNEST J. BROWN
Attorneys

MAY 1984

---

[4] *United States* v. *Atlas Life Ins. Co.*, 381 U.S. 233 (1965), invoked by the court below, has no bearing on this case. It involved the constitutionality of Section 804 of the Internal Revenue Code of 1954 (26 U.S.C.) calling for the division of a life insurance company's investment income, including income from municipal bonds, into two parts, the company's share and the policyholders' share, and the tax computations dependent thereon. It in no way involved the amended Rev. Stat. § 3701, which is controlling in this case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 333

MOTION

NO. 83-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FIRST NATIONAL BANK OF ATLANTA, etc.,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS

MICHAEL J. BOWERS
Attorney General of Georgia

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

VERLEY J. SPIVEY
Senior Assistant
Attorney General

JAMES C. PRATT
Assistant Attorney General

Counsel for Appellee
Marcus E. Collins, Sr.,
as State Revenue
Commissioner of Georgia

G. CAREY NELSON
Counsel for Appellee
Bartow County Board
of Tax Assessors

COUNSEL OF RECORD:

JAMES C. PRATT
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4168

May 2, 1984

19 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii, iii
MOTION TO DISMISS	1
PRELIMINARY STATEMENT	1
THE QUESTION IS NOT SUBSTANTIAL	2
1. As Now Construed, The Georgia Bank Share Tax Statute Imposes No Tax at All on Exempt Values	2
2. R.S. § 3701 Prohibits State Tax Burdens on U.S. Obligations, but Does Not Require That Federal Obligations Shelter Non-exempt Assets from Tax	8
3. The Question Does Not Call for Plenary Review	12
CONCLUSION	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Page

Cases

American Bank & Trust Co. v. Dallas County, 463 U.S. ____, 103 S.Ct. 3369 (1983) 8, 9, 13

Atlas Life Insurance Co. v. United States, 333 F.2d 289, 398 (10th Cir. 1964) 4

Bank of California v. Richardson, 248 U.S. 476 (1919) 7

Bartow County Bank v. Bartow County Board of Tax Assessors, 248 Ga. 703, 285 S.E.2d 920 (1982) *vacated and remanded*, 463 U.S. ____, 103 S.Ct. 3563 (1983) 1

Dale National Bank v. Commonwealth, 465 A.2d 965 (Pa. 1983) 9

Denman v. Slayton, 282 U.S. 514 (1931) 3

Hicks v. Miranda, 422 U.S. 332, 344 (1975) 13

Memphis Bank & Trust Co. v. Garner, 459 U.S. ____, 103 S.Ct. 692 (1983) 11

Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U.S. 313 (1930) 2-7, 10, 11

National Life Insurance Co. v. United States, 277 U.S. 508 (1928) 4, 5, 6, 10

New Jersey Realty Title Insurance Co. v. Division of Tax Appeals, 338 U.S. 665 (1950) 10, 11

Schuylkill Trust Co. v. Pennsylvania, 296 U.S. 113 (1935) 2, 6, 7

Society for Savings v. Bowers, 349 U.S. 143, 144 (1955) 11

Tully v. Griffin, 429 U.S. 68, 74 (1976) 13

United States v. Atlas Life Insurance Co., 381 U.S. 233 (1965) 3-7, 9-12

TABLE OF AUTHORITIES—Continued

Page

Statutes

Rev. Stat. § 3701 (1878), unofficially codified in 1926 as 31 U.S.C. § 742, amended in 1959 by Pub. L. No. 86-346, 73 Stat. 622, reformulated without substantive change as 31 U.S.C. § 3124(a) by Act of September 13, 1982, 96 Stat. 877, 945 ..... 3, 7-12

Rev. Stat. § 5219 (1878), unofficially codified as 12 U.S.C. § 548 ..... 6, 7

Life Insurance Company Income Tax Act of 1959, 26 U.S.C. §§ 801-20, Pub. L. No. 86-69, 73 Stat. 112 ..... 3, 5, 8

Ga. Code Ann. § 91A-3301 (1980) 2

O.C.G.A. § 45-7-50 (1982) 12

O.C.G.A. § 48-6-90 (Supp. 1983) 13

Other Authorities

Op. Att'y Gen. (Ga.) 82-79 12

IN THE

SUPREME COURT OF THE UNITED STATES

FIRST NATIONAL BANK OF ATLANTA, etc., *Appellant,* v. BARTOW COUNTY BOARD OF TAX ASSESSORS, et al., *Appellees.*	CASE NO. 83-1620

MOTION TO DISMISS

Appellees respectfully move the Court to dismiss the appeal herein for want of a substantial federal question, on the ground that the question presented was fully explored and correctly decided below and does not need further argument.

PRELIMINARY STATEMENT

Appellees concur in the Question Presented, the list of Parties, the Opinions Below, the Statement of Jursidiction the Statutes Involved, and the Statement of the Case presented by Appellant. Throughout the remainder of this Motion, Appellant will be referred to as "First Atlanta" and Appellees will refer to themselves as "the Taxing Authorities." [1]

[1] Appellant First National Bank of Atlanta is successor in interest to First National Bank of Cartersville, one of the three banks in *Bartow County Bank, et al. v. Bartow County Board of Tax Assessors, et al.*, 248 Ga. 703, 285 S.E.2d 920 (1982), *vacated and remanded* 463 U.S. ____, 103 S.Ct. 3563 (1983). Citizens & Southern National Bank, successor in interest to Citizens & Southern Bank of Bartow County, another of the three banks, argued in favor of the method proposed by the Taxing Authorities and adopted below. Bartow County Bank, the third bank, took the same position as First Atlanta in the court below but did not appeal the adverse decision. Appellees are unchanged except that Marcus E. Collins, Sr., has succeeded W. E. Strickland as State Revenue Commissioner of Georgia.

THE QUESTION IS NOT SUBSTANTIAL

1. As Now Construed, The Georgia Bank Share Tax Statute Imposes No Tax at All on Exempt Values.

Relying upon earlier decisions of this Court, First Atlanta argues that the "proportionate deduction method" adopted by the Georgia Supreme Court "provides federal obligations with but very limited immunity from state taxation," Juris. St. 5, but it is now firmly established that the method adopted below imposes no tax at all on exempt values. Indeed, the term "proportionate deduction method" is something of a misnomer: while the method calculates the proportion to which federal obligations comprise the gross assets of the bank, the deduction of federal obligation values from net worth is total, not proportional. Because the tax base under the Georgia statute is net worth (minus certain deductions), it is the deduction of values present in net worth that is pertinent here. *See* Ga. Code Ann. § 91A-3301 (1980).

First Atlanta relies upon *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930), and *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935), Juris. St. 15-17, and it is true that both of these cases disapproved of methods similar to the method adopted below. The following passage from the dissenting opinion in *Gehner* makes it clear that Missouri's insurance company tax statute operated in the same fashion as Georgia's bank share tax statute:

> To state the problem now presented in its simplest concrete form, if an insurance company has policy liabilities of $100,000, $100,000 of taxable personal property, and $100,000 of governmental bonds, its net assets would be $100,000. Under the statute of Missouri taxing net assets, as applied by the state court, one-half of this net worth or $50,000 would be subject to the tax since one-half of its entire property consists of taxable assets and so contributes one-half of the net. 281 U.S. at 322 (Stone, J., dissenting).

According to the majority in *Gehner* and First Atlanta in its Jurisdictional Statement, the company in Justice Stone's example must go tax free, on the theory that a dollar for dollar deduction of federal obligations from net worth is required to shield exempt values from tax. First Atlanta notes that *Gehner* involved R.S. § 3701, the statute involved here,[2] and that *Gehner's* statutory holding has never been explicitly overruled. Juris. St. 17, 18 n.17.

However, *Gehner* was decided over the strong dissent of Justice Stone, joined by Justices Holmes and Brandeis, and its basic analysis survived less than a year before it was repudiated, *sub silentio*, in *Denman v. Slayton*, 282 U.S. 514 (1931). Moreover, in *United States v. Atlas Life Insurance Co.*, 381 U.S. 233 (1965), this Court thoroughly analyzed the operation of methods like the method adopted below and concluded that they impose no tax at all on exempt values.

The *Atlas* Court considered the legality of the federal Life Insurance Company Income Tax Act of 1959, which allocated a company's receipts pro rata between a reserve for future claims (85% of Atlas' income) and the general earnings account (15% of Atlas' income). Tax was levied only on the general earnings account, so the net effect of the allocation was to permit the deduction of 15% of the

---

[2] R.S. § 3701, unofficially codified as 31 U.S.C. § 742 in 1926, was amended in 1959. Pub. L. 86-346, 73 Stat. 622. The possible effect of the amendment on this case is considered *infra* 8-12. In 1982, after the period in issue here, Title 31 was reformulated without substantive change and 31 U.S.C. § 742 was replaced by 31 U.S.C. § 3124(a) Act of Sept. 13, 1982, 96 Stat. 877, 945.

interest paid on exempt state and municipal bonds.

Atlas filed suit for a refund of taxes previously paid, claiming that under *National Life Insurance Co. v. United States*, 277 U.S. 508 (1928), and *Missouri v. Gehner*, *supra*, it was entitled to deduct its exempt receipts dollar for dollar from what would otherwise be the tax base. The District Court rejected the claim but the Court of Appeals reversed, finding an "impermissible imposition" of federal taxes upon the interest paid on state and municipal bonds. *Atlas Life Insurance Co. v. United States*, 333 F.2d 289, 398 (10th Cir. 1964). The Court of Appeals acknowledged the government's argument that Atlas' dollar for dollar method was "in effect allocating all taxable dollars to the policyholders and all tax-exempt dollars to the company," *id.* at 393, but felt this was sanctioned by *National Life* and *Missouri v. Gehner*.

On certiorari, this Court reversed. This Court recognized that a pro rata allocation of values between taxed and untaxed accounts, followed by a full deduction of exempt values to the extent represented in the taxed account, imposes no tax burden on the exempt values. The Court restated with approval the government's view of this matter, as follows:

> According to the Commissioner, the company's income from investments includes only its pro rata share of tax exempt interest and since this share is fully deductible by the company, the law imposes *no tax at all* on exempt interest. (emphasis supplied). 381 U.S. at 238.

The Court easily distinguished *National Life*, restricting it to cases in which one deduction is reduced by the full amount of another. Analyzed in terms of allocation, the vice in the *National Life* statute was that it arbitrarily

allocated tax exempt values to a particular account. Viewed in this light, it was the company in *Atlas*, not the government, whose position was inconsistent with *National Life*.

While the *Atlas* Court easily distinguished the 1959 Act from the statute involved in *National Life*, it could not distinguish the 1959 Act from the statute involved in *Missouri v. Gehner*. The Missouri state statute and the 1959 federal statute, while different in some respects, were functionally identical in their treatment of exempt securities. Recognizing that the position advanced by Atlas had been accepted over the strong dissent of Justices Holmes, Brandeis and Stone, the Court considered the basic soundness of the majority and minority positions in *Missouri v. Gehner:*

> In the *Gehner* case a state ad valorem property tax was imposed on the net personal property of an insurance company. Exempt government bonds were excluded from the tax base but only 84%—the ratio of taxable assets to total assets—of the legally required reserves was allowed as a deduction. The Court considered *National Life* to hold that "a state may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities." 281 U.S. at 321. This paraphrase of the *National Life* holding was correct and states the principle for which both of these cases have been cited. But it is obvious that the tax in *Gehner* did not infringe this rule. Reducing the reserve deduction by the ratio of taxable assets to total assets did not result in an increased tax burden on taxable property. The Court, nevertheless, invalidated the tax because "the ownership of United States bonds is made the basis of denying the full exemption which is accorded to those who own no such bonds." 281 U.S., at 321-322. The company was

> apparently to have the full benefit of both the exclusion of the government bonds and the deduction for the full amount of policyholder reserves. Otherwise, the law would not disregard the ownership of the bonds in exacting the tax. The *Gehner* case does, therefore, condemn more than an increase in the tax rate on taxable dollars for those owning exempt securities.
>
> This extension of *National Life* was soon repudiated. 381 U.S. at 244-45 (footnotes omitted).

The position of the *Gehner* dissenters, that exempt values may be allocated pro rata between taxed and untaxed accounts, was adopted unanimously by the *Atlas* Court:

> We see no sound reason, legal or economic, for distinguishing between the taxable and nontaxable dollar or for saying that the reserve must be satisfied by resort to taxable income alone.
>
> * * *
>
> We think that Congress can treat the receipts from a pool of fungible assets in this manner and that the taxpayer's desired allocation of these receipts is not constitutionally required. 381 U.S. at 249-50.

The court below correctly equated the positions of First Atlanta and Atlas Insurance Company, and correctly concluded that in neither case was the company asked to pay taxes on exempt values. Juris. St. A-5.

First Atlanta relies heavily upon *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935), Juris. St. 15-17, as it did in the court below, *see* Juris. St. A-6 and A-7, but the Taxing Authorities believe that the case is not in point. To the extent that *Schuylkill Trust* involved national bank stock and is said by First Atlanta to be pertinent here, Juris. St. 16 n.16, the case was governed by R.S. § 5219 (12 U.S.C. § 548), a different statute from

R.S. § 3701. The *Schuylkill Trust* Court based this aspect of its decision upon *Bank of California v. Richardson*, 248 U.S. 476 (1919), a case which construed R.S. § 5219 according to its own particular terms and legislative intent. There is no suggestion in *Schuylkill Trust* that this analysis would apply to R.S. § 3701.[3]

Moreover, while *Schuylkill Trust* on its facts involved a pro rata allocation, this Court's discussion of the national bank stock issue contains nothing but a flat assertion that the national bank shares "were included in the base or measure of the tax." 296 U.S. at 121. *Bank of California v. Richardson, supra*, did not involve a pro rata allocation, and the sole pro rata case cited in *Schuylkill Trust* is *Missouri v. Gehner*. These factors may explain why the *Atlas* Court, which took such pains to deal with *Gehner*, relegated *Schuylkill Trust* to a string citation in a footnote, on a point which did not involve pro rata allocation. *See* 381 U.S. at 245 n.15.

Missouri v. Gehner supports First Atlanta's argument that the Georgia bank share tax imposes a burden on federal obligations, but it has long been recognized that Justices Stone, Holmes and Brandeis held the better reasoned position in the case. This Court in *Atlas* made it clear that statutes like the Georgia bank share tax statute impose "no tax at all" on exempt values. It follows that First Atlanta is wrong when it states that "the proportionate deduction method substantially undercuts the protection of federal obligations from state taxation." Juris. St. 8.

---

[3] Justices Brandeis and Stone evidently concluded that R.S. § 5219 provided a different standard from R.S. § 3701, because they agreed with this aspect of the *Schuylkill Trust* opinion without indicating that they had reconsidered their dissent in *Missouri v. Gehner*. *See* 296 U.S. at 133.

2. R.S. § 3701 Prohibits State Tax Burdens on U.S. Obligations, but Does Not Require That Federal Obligations Shelter Non-exempt Assets from Tax.

Until 1959, R.S. § 3701 provided simply that federal obligations "shall be exempt from taxation by or under State or municipal or local authority." In 1959, the following language was added to the statute:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax . . . .

The new language extended the exemption, making it apply to certain indirect taxes including bank share taxes. *American Bank & Trust Co. v. Dallas County*, 463 U.S. ___, 103 S.Ct. 3369 (1983).

First Atlanta's appeal involves a different issue: not which state taxes are covered by R.S. § 3701, but what kind of limit does R.S. § 3701 place on the state taxes it covers. First Atlanta's position is that R.S. § 3701 requires that all federal obligations be excluded from gross assets before net worth is calculated. Juris. St. 13. First Atlanta states that its method is required because, compared to the pro rata method adopted below, it would tend to increase the relative attractiveness of federal obligations to bank share taxpayers. Juris. St. 11.

The Taxing Authorities will assume for purposes of argument that, compared to the pro rata method, First Atlanta's method will increase the investment value of federal obligations.[4] It does not follow, however, that

[4] It is more likely that the opposite is true. The record will disclose that First Atlanta held $8,553,168.74 in U.S. Treasury and Agency Securities during the period in issue. R. 58. Absent a federal obligations deduction, First Atlanta's share tax value was $4,748,426.77. R. 45. Therefore, First Atlanta gained no share tax benefit from its marginal purchase of more than $3.8 million in federal obligations. It is clear that share tax considerations did not cause First Atlanta to hold federal obligations, and that removing the share tax benefit would not have led First Atlanta to hold a smaller percentage of federal obligations. Documents submitted to the Georgia Supreme Court suggest that this pattern held for nearly every bank in the state. Similarly, at least one of the banks in *American Bank & Trust Co. v. Dallas County*, *supra*, held federal obligations in excess of its share value, *see* Brief of United States in Support of Petition for Certiorari at 4 n.4, and the bank in *Dale National Bank v. Commonwealth*, 465 A.2d 965, 966-67 (Pa. 1983) held about $2 million more in federal obligations than in share value.

Therefore, while the tax benefits gained under First Atlanta's method are large, they are squandered at a level of holdings that practically all banks would exceed anyway. The pro rata method offers smaller tax benefits for a bank's initial purchases, but continues to provide at least some tax benefit for every purchase without limit, as First Atlanta recognizes. Juris. St. 10 n.9. It is entirely possible that a small extra benefit, applied at the level of a marginal purchase, will tip the balance in favor of holding additional federal obligations. If so, then it is the pro rata method that will enhance the investment attractiveness of federal obligations.

First Atlanta's method is required by R.S. § 3701, unless one also concludes that R.S. § 3701 requires states using net worth levies to allow federal obligations to shelter non-exempt assets from tax.

It was established by this Court, in *United States v. Atlas Life Insurance Co.*, *supra*, that pro rata methods impose "no tax at all" on exempt values. To the extent that First Atlanta's method reduces taxes below the level at which federal obligations are rendered tax free, it is clear that non-exempt assets are escaping tax. As the Court below recognized, this is due to federal obligations sheltering or insulating non-exempt assets from tax. Juris. St. A-5. In First Atlanta's example, Juris. St. 8, the dollar for dollar method permits federal obligations to shelter more than nine times their value in taxable assets. According to First Atlanta, to fail to permit such sheltering is to "unlawfully hinder[ ] the federal govern-

ment's ability to borrow money." Juris. St. 11.

The Taxing Authorities are aware of no support for First Atlanta's view. *Missouri v. Gehner* disapproved of pro rata allocation, but not because pro rata allocation failed to shelter taxable assets. *Missouri v. Gehner* was based on a faulty analysis, the majority concluding that Missouri's pro rata method was like the non-pro rata method condemned in *National Life*. Nothing in *Missouri v. Gehner*, or in any other decision cited, suggests that R.S. § 3701 requires that federal obligations be permitted to shelter taxable assets.

First Atlanta also relies upon the "considered, directly or indirectly, in the computation" language of R.S. § 3701. However, as the court below correctly concluded, federal obligations are not considered in the computation of a tax if they are removed, affirmatively and completely, from the tax base prior to the point at which the levy is made:

> The foregoing computation removes from the tax base (net worth) so much of the net worth (tax base) as includes federal securities, thereby excluding, as required by [R.S. § 3701], such securities from consideration in the computation of the tax. Juris. St. A-8.

According to the court below, the constitutional standard stated in *United States v. Atlas Life Insurance Co.* is the same as the R.S. § 3701 standard. Juris. St. A-5. This conclusion is in accord with the decisions of this Court, both prior to and following the 1959 amendment. In *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665 (1950), this Court indicated that R.S. § 3701 provides the same standard as the Constitution:

> [W]e take as guides to our application of R.S. § 3701

> the decisions of this Court on the related constitutional question of immunity in *Bank of Commerce v. New York City*, 2 Black 620 (1863), and the *Bank Tax Case*, 2 Wall. 200 (1865) . . . . 338 U.S. at 672. *Accord Society for Savings v. Bowers*, 349 U.S. 143, 144 (1955).

The Congress that amended R.S. § 3701 was the same Congress that, after full consideration, found that a pro rata method "did not impose a tax on exempt interest in either the statutory or constitutional sense." *United States v. Atlas Life Insurance Co., supra*, 381 U.S. at 242. First Atlanta points to nothing in the legislative history of the 1959 amendment to R.S. § 3701 to suggest that Congress did an about-face a short time later when the issue reappeared in the context of federal obligations.

With respect to the post-1959 text of R.S. § 3701, 31 U.S.C. § 742, *Memphis Bank & Trust Co. v. Garner*, 459 U.S. ____, 103 S.Ct. 692 (1983), indicates that the statute should continue to be construed in light of constitutional principles:

> We have not previously had occasion to determine whether a state or local tax is "nondiscriminatory" within the meaning of § 742. However, we have frequently considered this concept in our decisions concerning the constitutional immunity of federal government property, including bonds and other securities, from taxation by the States. *Our decisions have treated § 742 as principally a restatement of the constitutional rule.* See, e.g., New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665, 672, 94 L.ed. 439, 70 S.Ct. 413 (1950); Missouri Ins. Co. v. Gehner, 281 U.S. 313, 321-22, 74 L.Ed. 870, 50 S.Ct. 326 (1930). (emphasis supplied) 103 S.Ct. at 696.

The constitutional rule is given in *United States v. Atlas*

Life Insurance Co., supra, and provides that pro rata allocation methods are perfectly proper.

First Atlanta's position not only conflicts in principle with the foregoing decisions, it leads to absurd results. Suppose a state decided to encourage persons to hold U.S. Savings Bonds by granting a $1.00 state income tax credit for each $100 of bonds held at the end of a tax year.[8] Such a credit would enhance government borrowing, but under First Atlanta's interpretation of R.S. § 3701 it would be illegal because the tax cannot be computed without reference to federal obligation values. *See* Juris. St. 13. The absurdity evaporates when R.S. § 3701 is construed in light of its purpose, which is simply to exempt federal obligations from state and local taxes. The court below correctly rejected First Atlanta's mechanical approach to R.S. § 3701.

3. The Question Does Not Call For Plenary Review.

First Atlanta argues that the question presented by this case will have a substantial impact upon the borrowing power of the government. First Atlanta points out that in 1982 banks held over 115 billion dollars in Treasury obligations alone. Juris. St. 10-11.

However, it seems certain that, for most banks considering whether to invest in federal obligations or in

[8] Some states do in fact expend resources to encourage persons to invest in U.S. Savings Bonds. For example, Georgia encourages State employees to purchase U.S. Savings Bonds by providing voluntary payroll deductions for this purpose. O.C.G.A. § 45-7-50. For a number of years payroll deductions were provided for no other purpose, and as recently as 1982 it was stated that state resources normally cannot be expended to administer payroll deduction plans. Op. Att'y Gen. (Ga.) 82-79.

competing taxable assets, First Atlanta's method is no more favorable to federal obligations than the pro rata method. *See supra* at 8-9 n.4. Moreover, First Atlanta's 115 billion is a nationwide figure, most of which is held in states whose bank taxes will not be affected by this case. As this Court recognized in *American Bank & Trust Co. v. Dallas County, supra*, 103 S.Ct. at 3375-76 n.9, only a few states rely upon the bank share tax. Given the uncertainty of any advantage attributable to First Atlanta's method, the Taxing Authorities submit that the impact of this question on the banks in these few states could hardly influence federal borrowing.

Moreover, while Georgia was listed by this Court as a share tax state, Georgia has now abandoned the share tax in favor of a modified gross receipts levy. *See* O.C.G.A. § 48-6-90 (Supp. 1983). Pending appeals and refund claims make this case important to banks and taxing authorities in Georgia, but since a change in bank tax liability for prior years will not alter the interest rates on outstanding obligations, the cost of borrowing to the United States will be affected not at all.

First Atlanta argues that plenary review is necessary to provide guidance to courts in other share tax states. Juris. St. 8-9. This argument ignores the fact that a dismissal of the appeal, for want of a substantial federal question, will be a ruling on the merits and binding upon state courts. *Tully v. Griffin*, 429 U.S. 68, 74 (1976); *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). In this case, unlike *American Bank & Trust Co. v. Dallas County, supra*, there is no conflict in the law. Accordingly, the question presented does not call for plenary review.

CONCLUSION

For the reasons stated, the Taxing Authorities urge the Court to dismiss the appeal in this case on the ground that it presents no substantial federal question.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

G. CAREY NELSON
Counsel for Appellee
Bartow County Board
of Tax Assessors

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

VERLEY J. SPIVEY
Senior Assistant
Attorney General

COUNSEL OF RECORD:

JAMES C. PRATT
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-4168

JAMES C. PRATT
Assistant Attorney General
Counsel for Appellee
Marcus E. Collins, Sr.,
as State Revenue
Commissioner of Georgia

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Motion to Dismiss upon counsel for the opposing party, pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, by mailing three copies in an envelope addressed to:

Lee Trammell Newton, Jr., Esq.
Hansell & Post
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101

with first class postage prepaid. All parties required to be served have been served.

This ____ day of _____, 1984.

JAMES C. PRATT
Assistant Attorney General

132 State Judicial Bldg.
Atlanta, Georgia 30334
(404) 656-4168

JOINT

APPENDIX

No. 83-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

JOINT APPENDIX

CHARLES T. ZINK
L. TRAMMELL NEWTON, JR.*
**Counsel of Record*
Hansell & Post
3300 First Atlanta Tower
Atlanta, Georgia
30383-3101
404/581-8000
Counsel for Appellant

G. CAREY NELSON
Nelson & Bradley
P. O. Box 362
Cartersville, Georgia 30120
404/382-4900
Counsel for Appellee
Bartow County Board
of Tax Assessors

MICHAEL J. BOWERS
Attorney General of
Georgia
JAMES P. GOOGE, JR.
Executive Assistant
Attorney General
H. PERRY MICHAEL
First Assistant
Attorney General
VERLEY J. SPIVEY
Senior Assistant
Attorney General
JAMES C. PRATT*
Assistant Attorney General
**Counsel of Record*
132 State Judicial Bldg.
Atlanta, Georgia 30334
404/656-4168
Counsel for Appellee
Marcus Collins
as State Revenue
Commissioner

July 13, 1984

TABLE OF CONTENTS

	Page
Relevant Docket Entries	A-1
Amended Return: Determination of Taxable Value of Bank Shares	A-2
Call Report for The First National Bank of Cartersville, Georgia	A-6

RELEVANT DOCKET ENTRIES

Superior Court of Bartow County, Georgia:

[Judgment in favor of Bartow County Board of Tax Assessors and against First National Bank of Cartersville, Georgia, entered on May 22, 1981]

Supreme Court of Georgia:

Date: 1/6/82

Judgment: affirmed

Supreme Court of the United States:

Appeal from the Supreme Court of Georgia. Case below, 248 Ga. 703, 285 S.E.2d 920. July 6, 1983. The judgment is vacated and the case is remanded for further consideration. . . .

Supreme Court of Georgia

Date: 1/4/84

Judgment: reversed and remanded [for further proceedings not inconsistent with opinion of 1/4/84].

AMENDED RETURN

Name of Bank FIRST NATIONAL BANK•

Address P.O. BOX 469

CARTERSVILLE, GA. 30120

AMENDED RETURN•
APR 6, 1980

DETERMINATION OF TAXABLE VALUE OF BANK SHARES UNDER GEORGIA CODE ANN. SEC. 92-2406

Declaration of Taxable Value of Shares as shown on the *unconsolidation* statement of condition of the bank or banking association as of *January 1.*

Capital or Net Worth

CAPITAL STOCK	$1,064,800•	
SURPLUS	2,129,600•	
UNDIVIDED PROFITS	2,467,383•	
RESERVES FOR CONTINGENCIES AND OTHER CAPITAL RESERVES	119,829•	
TOTAL CAPITAL OR NET WORTH ..		$5,781,612•

• Handwritten on form

DEDUCTIONS		
VALUE OF REAL ESTATE OWNED AND RETURNED FOR TAXATION ..... $		
LESS MORTGAGE DEBT		$933,445•
INVESTMENTS IN SUBSIDIARY BANKS WHICH ARE SUBJECT TO GEORGIA TAX ON SHARES		0•
SHARE OF UNDISTRIBUTED EARNINGS OF SUCH OTHER SUBSIDIARIES SUBJECT TO GEORGIA CORPORATE TAXES		0•
CAPITAL RESERVES TO THE EXTENT THAT SUCH RESERVES ARE NOT UNREASONABLE		0•
MARKET VALUE OF THE BANKS EQUITY IN REAL ESTATE HELD BY FULLY OWNED HOLDING CORPORATION (bank premises)		0•
ONE-HALF (½) OF THE PRINCIPAL AMOUNT OF LOANS OUTSTANDING UNDER THE GA. HIGHER EDUCATION ASSISTANCE CORPORATION. (HB-1783)		99,740•
VALUE OF U.S. GOV'T SECURITIES•		4,171,240•
TOTAL VALUE OF DEDUCTIONS ...		$5,204,425•
TAXABLE VALUATION OF SHARES		
TOTAL CAPITAL OR NET WORTH		$5,781,612•
TOTAL VALUE OF DEDUCTIONS		$5,204,425•
TAXABLE VALUE OF SHARES FOR DISTRIBUTION TO COUNTY AND MUNICIPALITIES		$ 557,187•

s/
Signature and Title

•Handwritten on form

[INTENTIONALLY LEFT BLANK]

CALL REPORT

CALL REPORT

CALL NO. 130 FOURTH 1979 CALL 12-31-79

COUNTY BARTOW

BRS. — 0002 SMSA — 00 BHC — 0031

02123 05 13-0720

THE FIRST NATIONAL BANK OF CARTERSVILLE
P.O. Box 469
CARTERSVILLE, GEORGIA 30120

Every item and schedule must be filled in. Printed items must not be amended. Amounts which cannot properly be

ASSETS

1.	Cash and due from depository institutions							5	030	1
2.	U.S. Treasury securities							4	171	2
3.	Obligations of other U.S. Government agencies and corporations							4	382	3
4.	Obligations of States and political subdivisions in the United States							5	760	4
5.	All other securities								96	5
6.	Federal funds sold and securities purchased under agreements to resell							2	300	6
7.	a. Loans, Total (excluding unearned income)	A	10		28	294				7
	b. LESS: allowance for possible loan losses					290				7
	c. Loans, Net							28	004	7
8.	Lease financing receivables								-0-	8
9.	Bank premises, furniture and fixtures, and other assets representing bank premises	C	6	—				1	045	9

CONSOLIDATED REPORT OF CONDITION
(Domestic — Small, Including Domestic Subsidiaries)
(Dollar Amounts in Thousands)

ALL BANKS: RETURN ORIGINAL & 1 COPY TO FDIC PROCESSING SECTION, 550 17th STREET, N.W., WASH., D.C. 20429

NATIONAL BANKS: ALSO SEND ONE COPY TO THE APPROPRIATE REGIONAL ADMINISTRATOR AND FEDERAL RESERVE DISTRICT BANK

(Please read carefully instructions for the preparation of Reports of Condition)

CLOSE OF BUSINESS DATE
December 31, 1979

included in the printed items must be entered under Other Assets or Other Liabilities.

	Sch.	Item	Col.	Mil.	Thou.	
10. Real estate owned other than bank premises . . .					75	10
11. All other assets	G	3	—		544	11
12. TOTAL ASSETS	*(sum of items 1 thru 11)*			51	407	12
LIABILITIES						
13. Demand deposits of individuals, partnerships, and corporations	F	1	A	17	179	12
14. Time and savings deposits of individuals, partnerships, and corporations	F	1	B&C	25	135	13
15. Deposits of United States Government	F	2	A,B&C		105	15
16. Deposits of States and political subdivisions in the United States	F	3	A,B&C	1	974	16
17. All other deposits	F	4	A,B&C		—0—	17
18. Certified and officers' checks	F	5	A		215	18
19. TOTAL DEPOSITS	*(sum of items 13 thru 18)*			44	608	19
a. Total demand deposits	F	6	A 18 409			19
b. Total time and savings deposits	F	6	B&C 26 199			19
20. Federal funds purchased and securities sold under agreements to repurchase					—0—	20
21. Interest-bearing demand notes (notes balances) issued to the U.S. Treasury & other liabilities for borrowed money					—0—	21
22. Mortgage indebtedness and liability for capitalized leases					—0—	22
23. All other liabilities	H	3	—	1	017	23
24. TOTAL LIABILITIES (excluding subordinated notes and debentures)	*(sum of items 19 thru 23)*			45	625	24
25. Subordinated notes and debentures					—0—	25

EQUITY CAPITAL

26.	Preferred stock			26
27.	Common stock			27
28.	Surplus			28
29.	Undivided profits and reserve for contingencies and other capital reserves			29
30.	TOTAL EQUITY CAPITAL *(sum of items 26 thru 29)*			30
31.	TOTAL LIABILITIES AND EQUITY CAPITAL *(sum of items 24, 25 and 30)*			31

NOTE: This report must be signed by an authorized officer and attested by not less than two directors for State nonmember Banks and three directors for National Banks other than the officer signing the report.

I, the undersigned officer, do hereby declare that this Report of Condition (including the supporting schedules) has been prepared in conformance with the instructions issued by the appropriate Federal authority and is true to the best of my knowledge and belief.

SIGNATURE OF OFFICER AUTHORIZED TO SIGN REPORT

s/

NAME & TITLE OF OFFICER AUTHORIZED TO SIGN REPORT

HELEN H. BRADLEY
Vice President and Cashier

Sch.	Item	Col.		Mil.	Thou.	
a. No. shares outstanding	-0-	(par value)				26
a. No. shares authorized	250,000					
b. No. shares outstanding	212,960	(par value)		1	065	27
				2	130	28
				2	587	29
(sum of items 26 thru 29)				5	782	30
(sum of items 24, 25 and 30)				51	407	31

issued by the appropriate Federal authority and is true to the best of my knowledge and belief.

AREA CODE/TELEPHONE NO. 404-382-1686

DATE SIGNED *(Month, Day, Year)* January 25, 1980

We, the undersigned directors, attest to the correctness of this Report of Condition (including the supporting schedules) and declare that it has been examined by us and to the best of our knowledge and belief has been prepared in conformance with the instructions and is true and correct.

s/

SIGNATURE OF DIRECTOR

s/

SIGNATURE OF DIRECTOR

s/

SIGNATURE OF DIRECTOR

APPELLANT'S

BRIEF

No. 83-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

BRIEF OF APPELLANT

CHARLES T. ZINK
L. TRAMMELL NEWTON, JR.*
*Counsel of Record
HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
404/581-8000

July 13, 1984

QUESTION PRESENTED

Whether Rev. Stat. § 3701, which forbids "every form of [state] taxation that would require that . . . [federal] obligations . . . be considered, directly or indirectly, in the computation of the tax," is violated by a state bank share tax measured by a bank's net worth (*i.e.*, its assets, including federal obligations in full, less its liabilities) minus only a proportion of the federal obligations held as assets by the bank?

PARTIES

The judgment and decision from which this appeal is taken were entered in three cases which were consolidated for appeal by the Supreme Court of Georgia. First National Bank of Cartersville, Georgia, the appellant in Case No. 37870 in the Supreme Court of Georgia, merged with The First National Bank of Atlanta,* the named appellant here, during the pendency of the appeal below. The appellees below were Bartow County Board of Tax Assessors and W. E. Strickland as State Revenue Commissioner. W. E. Strickland has since been succeeded in office by Marcus Collins. The appellees named here are therefore Bartow County Board of Tax Assessors and Marcus Collins as State Revenue Commissioner.**

---

*The First National Bank of Atlanta is a wholly owned subsidiary of First Atlanta Corporation. First Atlanta Corporation has no subsidiaries or affiliates other than its wholly owned subsidiaries, and The First National Bank of Atlanta has no subsidiaries or affiliates, other than its wholly owned subsidiaries and the wholly owned subsidiaries of First Atlanta Corporation.

**The parties to the other two cases below were Bartow County Bank, as appellant in Case No. 37868 below, and Citizens & Southern Bank of Bartow County, as appellant in Case No. 37869 below. Citizens & Southern Bank of Bartow County merged with Citizens and Southern National Bank, a subsidiary of Citizens and Southern Georgia Corporation, during the pendency of the appeal below. The appellees in both those cases were Bartow County Board of Tax Assessors and W. E. Strickland (succeeded in office by Marcus Collins) as State Revenue Commissioner.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutes Involved	3
Statement of the Case	3
Summary of Argument	6
Argument	7
A. The Plain Meaning of Rev. Stat. § 3701 Requires a Complete Exclusion of Federal Obligations	7
B. The Legislative History of Rev. Stat. § 3701 Shows That Congress Intended a Complete Exclusion of Federal Obligations	9
C. The Atlas Life Case Has No Bearing on How Rev. Stat. § 3701 Should Be Construed	16
D. The Proportionate Deduction Approach Improperly Allows the States to Determine Arbitrarily the Extent to Which Federal Obligations Will Be Exempt from State Taxation	18
Conclusion	23

TABLE OF AUTHORITIES

	Page
American Bank & Trust Co. v. Dallas County, 103 S.Ct. 3369 (1983)	passim
Bank v. Supervisors, 74 U.S. (7 Wall.) 26 (1869)	10
Bank of Commerce v. New York City, 67 U.S. (2 Black) 620 (1863)	10, 19
Bank Tax Case, 69 U.S. (2 Wall.) 200 (1865)	10
Bartow County Bank v. Bartow County Board of Tax Assessors, 103 S.Ct. 3563 (1983)	2, 5
Bartow County Bank v. Bartow County Board of Tax Assessors, 248 Ga. 703, 285 S.E.2d 920 (1982)	2, 4
Bartow County Bank v. Bartow County Board of Tax Assessors, 251 Ga. 831, 312 S.E.2d 102 (1984)	passim
Carson v. Roane-Anderson Co., 342 U.S. 232 (1952)	10
City of Waco v. Amicable Life Insurance Co., 230 S.W. 698 (Tex.Civ.App. — Austin 1921), *aff'd*, 248 S.W. 332 (Tex. Comm'n App. 1923, judgmt adopted)	13
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	3
Des Moines National Bank v. Fairweather, 263 U.S. 103 (1923)	17
Farmers & Mechanics Savings Bank of Minneapolis v. Minnesota, 232 U.S. 516 (1914)	11
Home Savings Bank v. City of Des Moines, 205 U.S. 503 (1907)	11
M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)	10, 19
Memphis Bank & Trust Co. v. Garner, 103 S.Ct. 692 (1983)	8, 15, 22
Missouri ex rel. *Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930)	12, 13

TABLE OF AUTHORITIES — (Continued)

	Page
New Jersey Realty Title Insurance Co. v. Division of Tax Appeals, 338 U.S. 665 (1950)	11, 12, 14, 15, 22
Packard Motor Car Co. v. City of Detroit, 232 Mich. 245, 205 N.W. 106 (1925)	13
Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939)	10
Schuylkill Trust Co. v. Pennsylvania, 296 U.S. 113 (1935)	13
Smith v. Davis, 323 U.S. 111 (1944)	7, 10, 22
Society for Savings in the City of Cleveland v. Bowers, 349 U.S. 143 (1955)	11
Stephenson & Potter v. Glander, 67 N.E.2d 14 (Ohio Bd. Tax App. 1946)	13
United States v. Atlas Life Insurance Co., 381 U.S. 233 (1965)	6, 7, 13, 16-18
Van Allen v. Assessors, 70 U.S. (3 Wall.) 573 (1866)	10, 11
Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449 (1829)	10, 19

Statutes

Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105(a), 73 Stat. 622	8
GA. CODE ANN. § 91A-3301 (1980)	3
Ga. L. 1983, p. 1350, § 5, O.C.G.A. § 48-6-90 (Supp. 1983)	3
Laws of Pa., Act 1983-66 (amending Act of Mar. 4, 1971 (P.L. 6, No. 2)	20
Life Insurance Company Income Tax Act of 1959, Pub. L. No. 86-69, 73 Stat. 112 (codified at 26 U.S.C. §§ 801-820)	16-18
MONT. CODE ANN. § 15-31-116 (enacted as Sec. 1, Ch. 673, L. 1983)	20
Rev. Stat. § 3701	passim

TABLE OF AUTHORITIES — (Continued)

	Page
26 U.S.C. § 804	17
28 U.S.C. § 1257(2)	2, 3
31 U.S.C. § 742	3
31 U.S.C. § 3124	3

Other Authorities

Hearings on Public Debt Ceiling and Interest Rate Ceiling on Bonds Before The House Committee on Ways and Means, 86th Cong., 1st Sess. (1959)	12, 14
H. R. Rep. 651, 97th Cong., 2d Sess. 1 (1982)	3
Oxford English Dictionary (1961)	8
S. Rep. No. 909, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 2769	12, 15
Webster's Collegiate Thesaurus (1976)	8

In The

Supreme Court of the United States

October Term, 1983

The First National Bank of Atlanta
as successor in interest to
First National Bank of Cartersville, Georgia,
Appellant,

v.

Bartow County Board of Tax Assessors
and Marcus Collins
as successor in interest to
W. E. Strickland, State Revenue Commissioner,
Appellees.

On Appeal From The
Supreme Court of Georgia

BRIEF OF APPELLANT

Appellant respectfully requests that the Court reverse the decision and judgment of the Supreme Court of Georgia in *The First National Bank of Atlanta as successor in interest to First National Bank of Cartersville, Georgia v. Bartow County Board of Tax Assessors* (Case No. 37870), 251 Ga. 831, 312 S.E.2d 102 (1984).

OPINIONS BELOW

The decision from which this appeal is taken is reported as *Bartow County Bank v. Bartow County Board of Tax Assessors*, 251 Ga. 831, 312 S.E.2d 102 (1984), and is repro-

duced in J.S. App. at A-1.[1] A prior decision relating to the same matter is reported as *Bartow County Bank v. Bartow County Board of Tax Assessors*, 248 Ga. 703, 285 S.E.2d 920 (1982), and is reproduced in J.S. App. at A-10. The judgment there was vacated and remanded by this Court in *Bartow County Bank v. Bartow County Board of Tax Assessors*, 103 S.Ct. 3563 (1983), reproduced in J.S. App. at A-9.

JURISDICTION

The judgment of the court below was entered on January 4, 1984. (J.S. App. at A-1). Notices of appeal from that judgment were filed in the Georgia Supreme Court and in the trial court on March 2, 1984. (J.S. App. at A-24, 25). A jurisdictional statement was filed on April 3, 1984, within ninety days of the decision from which this appeal is taken. On May 29, 1984, the Court noted probable jurisdiction.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(2) because there has been drawn in question the validity of a state statute on the ground of its being repugnant to the laws of the United States, the decision below having been in favor of its validity.[2] The judgment of the

[1] References to "J.S. App." are to the Appendix included with the Jurisdictional Statement. References to "J.A." are to the Joint Appendix.

[2] In the Supreme Court of Georgia, appellant took the position that the Georgia bank share tax should have been construed so as to permit and require full exclusion of federal obligations from the bank share tax base. If the court below had so construed the state statute, the statute would have been consistent with Rev. Stat. § 3701, the controlling federal statute, and therefore valid. The Supreme Court of Georgia instead construed the state statute in a manner which, appellant contends, makes it contrary to Rev. Stat. § 3701. It is the validity of the statute as so construed that "is drawn in question . . . on the ground of its being repugnant to the . . . laws of the United States. . . ." 28 U.S.C. § 1257(2).

Supreme Court of Georgia is final for the purpose of review by this Court under 28 U.S.C. § 1257(2). *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-80 (1975).

STATUTES INVOLVED

U.S. Rev. Stat. § 3701 *(formerly at 31 U.S.C. § 742).*[3]

All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

Ga. Code Ann. § 91A-3301 (1980).[4]

Reproduced in J.S. App. at A-26.

STATEMENT OF THE CASE

Appellant is the successor in interest to a bank whose shares were taxed under GA. CODE ANN. § 91A-3301 (1980). The appellees are the local taxing authority responsible for

[3] Effective September 13, 1982, Rev. Stat. § 3701 was replaced by 31 U.S.C. § 3124. This change was part of a larger effort by Congress to "codify, and enact without substantive change" numerous provisions of title 31 of the United States Code. H.R. Rep. No. 651, 97th Cong., 2d Sess. 1 (1982). *See American Bank & Trust Co. v. Dallas County*, 103 S.Ct. 3369, 3372 n. 1 (1983). Rev. Stat. § 3701 was in effect during the tax year involved here.

[4] Effective January 1, 1984, the Georgia bank share tax law was superseded by a law that made banks "subject to all forms of state and local taxation in the same manner and to the same extent as other business corporations in Georgia." Ga. L. 1983, p. 1350, § 5; *O.C.G.A.* § 48-6-90 (Supp. 1983).

assessing and collecting the bank share tax, and the state revenue commissioner, who intervened in the courts below.

The Georgia property tax on the shares of the appellant was calculated by first determining the taxable value of the shares, and by then applying a tax rate to that tax base. That computation established the tax liability with respect to the property. At every stage of the proceedings described below, the appellant challenged the Georgia bank share tax as violating the immunity from state taxation enjoyed by federal obligations under Rev. Stat. § 3701.

On April 6, 1980, appellant filed a bank share tax return with the board of tax assessors. That return showed a "Total Capital or Net Worth" of $5,781,612, various deductions including one of $4,171,240 for the "Value of U.S. Gov't Securities," and a resulting "Taxable Valuation of Shares" of $557,187 (J.A. at A-3, A-4). The appellee board of tax assessors disallowed the exclusion of federal obligations from the tax base. Thereafter the Bartow County Board of Equalization (on August 9, 1980) and the Superior Court of Bartow County, Georgia (by judgment of May 22, 1981) affirmed the disallowance of the exclusion.

On appeal to the Supreme Court of Georgia, that court held (on January 6, 1982) that the bank share tax was "not in contravention" of Rev. Stat. § 3701. *Bartow County Bank v. Bartow County Board of Tax Assessors,* 248 Ga. 703, 711, 285 S.E.2d 920, 927 (1982). (J.S. App. at A-10, 22).

The bank appealed that decision to this Court, and on July 6, 1983, the Court vacated the decision of the Georgia Supreme Court and remanded the case for consideration in light of this Court's decision on the previous day in *American Bank & Trust Co. v. Dallas County,* 103 S.Ct. 3369 (1983), which held that a "property tax on bank shares, computed on the basis of the bank's net assets without any deduction for tax-exempt United States obligations held by the bank" violated Rev. Stat. § 3701. *Bartow County Bank v. Bartow County Board of Tax Assessors,* 103 S.Ct. 3563 (1983) (J.S. App. at A-9).

On remand, the Supreme Court of Georgia construed the Georgia bank share tax to allow, and require only, a proportionate deduction for federal obligations. The court gave the following illustration of how its newly created proportionate deduction was to be computed:

> Applying the proportionate deduction method to the appellant Citizens & Southern Bank of Bartow County . . ., its total assets of $20,463,522 for the year 1979 included $1,995,393 in federal securities. Thus, its federal securities represented 9.75% of its assets. Hence, 9.75% of its net worth is represented by federal securities. The bank is therefore entitled to reduce its net worth ($2,082,588) by 9.75% ($203,043) so as to remove from the tax base so much of its net worth as is represented by federal securities.

251 Ga. at 835-36, 312 S.E.2d at 106 (J.S. App. at A-7). The deduction for federal securities for the bank used in the illustration was thus reduced from approximately $2,000,000 to about $200,000, or by a factor of almost ten. The court's reasoning was that federal obligations were required to be deducted from the tax base only "to the extent that they are represented in net worth," on the theory that "only a portion of the federal obligations are attributable to net worth." 251 Ga. at 833, 312 S.E.2d at 105 (J.S. App. at A-4). As the numbers show, the proportionate deduction method substantially undercuts the protection of federal obligations from state taxation. The court nonetheless concluded that its proportionate deduction satisfied the requirements of Rev. Stat. § 3701, so that the bank share tax as so construed was not in conflict with federal law.

Bartow County Bank v. Bartow County Board of Tax Assessors, 251 Ga. 831, 312 S.E.2d 102 (1984) (J.S. App. at A-1). This appeal is taken from that decision.

SUMMARY OF ARGUMENT

1. Rev. Stat. § 3701 forbids "every form of [state] taxation that would require that . . . [federal] obligations . . . be considered, directly or indirectly, in the computation of the tax . . . ." A proportionate deduction for federal obligations "consider[s]" those obligations by taking them into account in the computation of the bank share tax at issue. The formalistic device conceived by the Georgia Supreme Court therefore violates the plain meaning of the statute.

2. The legislative history of Rev. Stat. § 3701 supports the conclusion to be drawn from its plain words. Even before Congress clarified the extent of the prohibition against state taxation of federal obligations by amending the statute in 1959, the Court had invalidated a series of state attempts to reach federal obligations, including methods which imposed taxes on net assets. When one state nonetheless persisted, Congress passed a strongly worded amendment, intended to put an end to all such efforts. The pertinent committee reports show that those who drafted and approved the 1959 amendment intended that federal obligation components be completely eliminated from state tax bases, including the residual type tax base at issue here.

3. The Court's decision in *United States v. Atlas Life Insurance Co.*, 381 U.S. 233 (1965), provides no authority for holding that Rev. Stat. § 3701 permits a proportionate deduction. The *Atlas Life* case involved the extent of the constitutional prohibition against federal taxation of state debt. This case involves, by contrast, the extent of a different and specific statutory prohibition against state taxes

which even consider federal obligations. The *Atlas Life* decision employs, moreover, a formalistic analysis of a type which this Court recently held was inappropriate under Rev. Stat. § 3701.

4. The proportionate deduction approach improperly vests the states with discretion to determine the extent to which they will tax federal obligations. The particular approach employed by the Georgia Supreme Court demonstrates the arbitrariness with which a proportionate formula may be developed, and fails even theoretically to exclude federal obligations. The failure of the proportionate deduction completely to exclude federal obligations improperly diminishes the investment attractiveness of federal obligations.

ARGUMENT

A. The Plain Meaning of Rev. Stat. § 3701 Requires a Complete Exclusion of Federal Obligations.

Until 1959, Rev. Stat. § 3701 provided:

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

As it then read, Rev. Stat. § 3701 reflected "the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *Smith v. Davis*, 323 U.S. 111, 117 (1944).

Rev. Stat. § 3701 was amended in 1959 to provide that the immunity of federal obligations from state or local tax:

> extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax . . . .

Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105(a), 73 Stat. 622. The Court ruled twice in 1983 that the exemption, as amended, was to be read expansively, noting in *Memphis Bank & Trust Co. v. Garner*, 103 S.Ct. 692, 695 (1983), that the statute "establishes a broad exemption," and in *American Bank & Trust Co. v. Dallas County*, 103 S.Ct. 3369, 3374 (1983), that "[t]he exemption . . . is sweeping." As the Court also ruled in *American Bank*, "the [1959] amendment abolished the formalistic inquiry whether the tax is *on* a distinct interest, and replaced it with the inquiry whether 'computation of the tax' requires consideration of federal obligations." 103 S.Ct. at 3377. (Emphasis in original).

The proportionate deduction method adopted by the Supreme Court of Georgia is inconsistent with the command of Rev. Stat. § 3701, as amended. That method employs a "formalistic inquiry whether the tax is *on*" federal obligations, the approach rejected by this Court in *American Bank*, and plainly considers federal obligations "in the computation of the tax," as forbidden by the statute.

In *American Bank*, this Court defined "considered" in this statute to mean "taken into account" or "included in the accounting". 103 S.Ct. at 3374. The Court recognized that this term was used with its ordinary meaning in the statute. Thus, Rev. Stat. § 3701 forbids all state taxes that take into account federal obligations in their computation. As a result, states are required to exclude or eliminate federal obligations when computing a state tax.[5]

The very example used by the court below to illustrate its taxing method (quoted at p. 5 above) demonstrates that the Georgia bank share tax, as now construed, does not exclude

[5] Webster's Collegiate Thesaurus 306 (1976) defines "exclude" and "eliminate" as synonyms and defines "exclude" to mean "to prevent . . . consideration . . . of". *Accord*, Oxford English Dictionary 382-83 (1961).

or eliminate federal obligations.[6] The value of a bank's federal obligations are added in once in computing total assets; they are taken into account a second time as the numerator of the fraction used to determine the proportion; and they are included a third time as a necessary component of the net worth to which the fraction is applied. *Bartow County Bank v. Bartow County Board of Tax Assessors*, 251 Ga. at 835-36, 312 S.E.2d at 106. (J.S. App. at A-7). The calculation the Supreme Court of Georgia requires to be made thus "takes into account, at least indirectly, the federal obligations that constitute a part of the bank's assets." *American Bank*, 103 S.Ct. at 3374. The only manner in which federal obligations may be eliminated from consideration in computing the tax base is to exclude them from total assets *before* determining net assets.

The plain language of the 1959 amendment to Rev. Stat. § 3701 forbids the tax computed by the court below. The statute requires that the federal obligations be excluded from total assets before determining the net worth tax base.

B. The Legislative History of Rev. Stat. § 3701 Shows That Congress Intended a Complete Exclusion of Federal Obligations.

The first legislative expressions of the rule against state or local taxation of federal obligations appeared in a series of revenue laws, authorizing the issuance of federal securities used to finance the Civil War. Each of those statutes provided that the instruments issued were to be exempt

[6] Indeed, this Court observed in *American Bank* that Georgia was among those states whose bank share taxes at the time "explicitly required that the share's value be determined according to the value of the bank's assets." 103 S.Ct. at 3375 n. 9.

from taxation by or under state authority.[7] The Court relied on the first several of those laws to strike taxes which New York attempted to impose, first, on "capital" and subsequently, "on a valuation equal to ... capital stock [and] surplus earnings." *See Bank of Commerce v. New York City*, 67 U.S. (2 Black) 620, 628 (1863); *Bank Tax Case*, 69 U.S. (2 Wall.) 200 (1865).

In *Van Allen v. Assessors*, 70 U.S. (3 Wall.) 573 (1866), however, the Court found that a tax imposed on shareholders measured by capital or net assets (and not levied directly on the capital of banks or other entities) did not run afoul of those laws and therefore could be upheld.[8]

---

[7] The early revenue laws are listed and described in *Smith v. Davis*, 323 U.S. 111, 117 n. 7 (1944). The principle that state and local authorities lack the power to tax federal obligations was established as a matter of *constitutional* law in *Weston v. City of Charleston*, 27 U.S. (2 Pet.) 449 (1829), in which the Court invalidated a municipal tax payable by individuals holding "stock issued for loans made to the government of the United States." *Id.* at 465. The *Weston* decision was a specific application of the more general rule, recognized in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), that the states have no ability, by taxation or otherwise, to burden or restrict Congress in carrying out the powers conferred on the federal government.

[8] Even so, the Court shortly re-emphasized, in *Bank v. Supervisors*, 74 U.S. (7 Wall.) 26 (1869), the otherwise broad scope of the early statutory prohibitions against state taxation of federal debt. The Court ruled there that interest-free "notes" could not be taxed by New York, regardless of whether they enjoyed constitutional immunity, because Congress had affirmatively judged the utility of the notes "as a means of carrying on the government", *id.* at 30, thus properly exercising its discretion to exempt the instruments at issue. Congress' authority to protect federal instrumentalities with greater tax immunity than that constitutionally mandated is firmly established. *See Carson v. Roane-Anderson Co.*, 342 U.S. 232 (1952); *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939).

From the *Van Allen* decision in 1866 until the *American Bank* decision in 1983, the Court adhered to the distinction between a tax levied against shareholders for the value of their shares, and a tax assessed directly against institutions such as banks on their net worth. The *American Bank* case held that the *Van Allen* share tax fiction had been eliminated by the 1959 amendment to Rev. Stat. § 3701. Even between 1866 and 1959, though, the Court continued to invalidate levies on net assets tax bases to which the *Van Allen* rationale could not be applied, on the ground that such taxes violated Rev. Stat. § 3701 by reaching federal obligations. *See Home Savings Bank v. City of Des Moines*, 205 U.S. 503 (1907); *Farmers & Mechanics Savings Bank of Minneapolis v. Minnesota*, 232 U.S. 516 (1914); *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665 (1950); and *Society for Savings in the City of Cleveland v. Bowers*, 349 U.S. 143, 146 (1955).[9]

Of these cases, the *New Jersey Realty Title* decision is perhaps the most important because the decision there is the only one to which any reference is made in the pertinent legislative history of the 1959 amendment to Rev. Stat.

---

[9] These cases invalidated, respectively, a tax payable by a bank on the "value" of the bank's shares, a tax payable by a mutual savings bank on its depositors' "surplus," a tax payable by an insurance company on "the paid-up capital and the surplus," and a tax found to be payable by a mutual savings bank on "the capital, the surplus or reserve fund and the undivided profits." In the *Society for Savings* case, for example, the Court observed that, "The Supreme Court of Ohio recognized that this tax, based as it was upon the inclusion of federal obligations, would have to fall if directed against the banks." 349 U.S. at 146.

§ 3701.[10] That case involved a tax on the net worth of an insurance company, the assets of which included both federal obligations and accrued interest on those securities. The Court expressly found it to be "clear . . . that in the computation of the assessment the face value of appellant's government bonds, together with the interest thereon, was in fact included." 338 U.S. at 670. The tax was found to violate Rev. Stat. § 3701 because the tax was held to have been computed with reference to the bonds themselves, as well as with reference to the income they generated.

It was in this setting that Congress acted when in 1959 it clarified the extent of the prohibition expressed in Rev. Stat. § 3701.[11]

---

[10] In a statement to the House Ways and Means Committee in support of the 1959 amendment, the Secretary of the Treasury referred specifically to the *New Jersey Realty Title* case, giving his view that the decision there was contrary to the position being taken by the state taxing authorities. See Hearings on Public Debt Ceiling and Interest Rate Ceiling on Bonds Before the House Committee on Ways and Means, 86th Cong., 1st Sess., at 70 (1959) (supplemental statement of Secretary of the Treasury Anderson). The Senate Finance Committee also referred in its report to a case which, although unspecified, appears from context to have been the *New Jersey Realty Title* case. See S. Rep. No. 909, 86th Cong., 1st Sess. (1959) *reprinted in* 1959 U.S. Code Cong. & Ad. News 2769, 2773.

[11] As of 1959, the Court also had held twice (including once with respect to Rev. Stat § 3701) that a proportionate deduction was insufficient to eliminate an asset from a net worth tax base in the face of a federal statute prohibiting taxation of the asset. In *Missouri* ex rel. *Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930), the Court held invalid a formula which permitted federal obligations to be subtracted from assets, but which then also required that liabilities be "reduced by the proportion that the value of United States bonds bears to total assets" in the course of determining a "net assets" tax base. *Id.* at 321. The tax was

(Continued on following page.)

The particular "catalyst" for the 1959 amendment, as the Court observed in *American Bank*, "was an Idaho tax 'upon

---

(Continued from previous page.)

ruled illegal because "the value of the appellant's government bonds was *not disregarded* in making up the estimate of taxable net values." *Id.* at 322. (Emphasis added). Although *United States v. Atlas Life Ins. Co.*, 381 U.S. 233 (1965), later qualified *Gehner* to the extent that *Gehner* purported to rest on constitutional principles, *Atlas Life* preserved the holding of *Gehner* insofar as it was based on the pre-1959 version of Rev. Stat. § 3701. *See Atlas Life*, 381 U.S. at 245 n. 16.

In *Schuylkill Trust Co. v. Pennsylvania*, 296 U.S. 113 (1935), the Court ruled, without elaboration, that a proportionate deduction (described, 296 U.S. at 117) was not sufficient to eliminate shares of a national bank, which had already been the subject of a share tax imposed on a trust company as a shareholder in the national bank, from the net worth tax base for another share tax imposed on the shareholders of the trust company. The Court held that "[i]t is indisputable that the shares of stock of the [national bank] owned by the [trust company] were included in the base or measure of the tax" on the trust company's shareholders, notwithstanding the proportionate deduction. *Id.* at 120-21. The Supreme Court of Georgia was mistaken in its conclusion below, 251 Ga. at 835, 312 S.E.2d at 106 (J.S. App. at A-7), that in *Schuylkill Trust Co.* the "National Bank shares had been afforded no deduction at all." *See Schuylkill Trust Co.*, 296 U.S. at 121-22 ("whereas there should have been a flat deduction of all shares . . ., shares of the [national bank] were included in shares granted only a proportional deduction").

Several state court decisions prior to 1959 also recognized that in order to maintain the exemption to be enjoyed by federal obligations, taxing authorities had to exclude them from total assets prior to determining net taxable values. *See Stephenson & Potter v. Glander*, 67 N.E.2d 14 (Ohio Bd. Tax App. 1946); *Packard Motor Car Co. v. City of Detroit*, 232 Mich. 245, 205 N.W. 106, 107 (1925); *City of Waco v. Amicable Life Ins. Co.*, 230 S.W. 698, 703 (Tex.Civ.App. – Austin 1921), *aff'd*, 248 S.W. 332, 336 (Tex.Comm'n App. 1923, judgmt adopted).

every individual . . . which shall be according to and measured by his net income.'" 103 S.Ct. at 3376. Idaho had taken the position, according to a statement submitted by the Secretary of the Treasury, that a state income tax "measured by" an individual's net income was different from a tax "upon" such an individual's net income, and was therefore not affected by Rev. Stat. § 3701, even though such income included federal obligation income. *See* Hearings on Public Debt Ceiling and Interest Rate Ceiling on Bonds Before the House Committee on Ways and Means, 86th Cong., 1st Sess. at 70 (1959) ("Hearings"). Idaho had insisted on this position despite the *New Jersey Realty Title* case, which had held that "the omission from § 3701 of the phrase 'and interest thereon'" (338 U.S. at 670) could not be taken as evidence that Congress had intended to permit state taxation of interest paid by the federal government. Hearings at 69. The Secretary was also concerned because the Treasury Department had been "unable to obtain assurances that the States will discontinue requiring the inclusion of interest on obligations of the United States in computing State income taxes." *Id.* at 71. The solution the Secretary proposed was to "clarify the exemption by expressly exempting Federal obligations and the interest on them from every form of State and local income taxes." *Id.*

This portion of the legislative history of the 1959 amendment to Rev. Stat. § 3701 also indicates how those who drafted and approved the language of the amendment contemplated that exempt components were to be removed from tax bases. In dealing with Idaho's attempt to tax income from federal securities, the Treasury Secretary commented that Idaho had required "the inclusion of interest on obligations of the United States in computing gross income (from which taxable net income is determined)." Hearings at 69-70. In making its report, the Senate Finance Committee

noted, in similar fashion, that "one State has taken the position that the statute as now worded does not prohibit a State from including interest on Federal obligations in computing 'gross income' upon which taxable net income is determined." S. Rep. No. 909, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. and Adm. News 2769, 2773. Both the Secretary and the Committee thus intended that the exempt interest be excluded from *gross* income befor computation of the residual, *net* income tax base. Applying that principle to the issue here, it may be concluded that Congress also intended that federal obligations be similarly excluded from *gross* assets before computation of a residual, *net* assets tax base. Such a determination is supported by the language actually employed in the amendment, forbidding "that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax."

As the Court observed in *American Bank*, "The [1959] amendment plainly did more than make clear that the interest on federal obligations was tax exempt." 103 S.Ct. at 3376. In changing the statute, "Congress intended to sweep away all formal distinctions and to invalidate all taxes measured directly or indirectly by the value of federal obligations, except those specified in the amendment." *Id.* at 3377. The amendment was worded to protect "the obligations or the interest thereon, or both" (Rev. Stat. § 3701), thus covering the dual holding in the *New Jersey Realty Title* case that the inclusion "in the computation of the assessment [of] the face value of appellant's government bonds, *together with* the interest thereon" was improper. 338 U.S. at 670. (Emphasis added).

These circumstances indicate that Congress intended to enact, and did enact, a prohibition that was both "broad" (*Memphis Bank*, 103 S.Ct. at 695) and "sweeping" (*Ameri-*

can Bank, 103 S.Ct. at 3374). The specific construction of Rev. Stat. § 3701 and its precursors as requiring complete exclusion of federal obligations from net assets tax bases, even prior to the 1959 amendment, and Congress' determination to clarify § 3701 in such a manner as to put an end to continuing efforts by state and local taxing authorities to find means of circumventing the pre-1959 version of § 3701, support the conclusion that Congress meant to outlaw every form of state levy that involved federal securities in the calculation of a tax base.

C. The Atlas Life Case Has No Bearing on How Rev. Stat. § 3701 Should Be Construed.

In the decision below, the Georgia Supreme Court referred to this Court's opinion in *United States v. Atlas Life Insurance Co.,* 381 U.S. 233 (1965), commenting that appellant's argument for a full exclusion was "similar" to the argument unsuccessfully advanced by the federal taxpayer in that case. *Bartow County Bank v. Bartow County Board of Tax Assessors,* 251 Ga. at 834, 312 S.E.2d at 105 (J.S. App. at A-5). *Atlas Life* involved the construction of the Life Insurance Company Income Tax Act of 1959, Pub. L. No. 86-69, 73 Stat. 112 (codified at 26 U.S.C. §§ 801-820), and found constitutional Congress' allocation of income from municipal securities between the policyholders' reserve and the insurance company itself. Reference by the Supreme Court of Georgia to *Atlas Life* is misdirected for several reasons.

This case involves, first of all, the determination of the meaning of Rev. Stat. § 3701. *Atlas Life,* by contrast, involved the reach of the *constitutional* prohibition against federal taxation of state debt, and not, as here, the reach of a specific *statutory* prohibition against state taxation of federal debt. This Court's ultimate holding in *Atlas Life* was only that the constitutional doctrine providing municipalities with federal tax immunity did not extend so far as to require that a life insurance company be permitted to deduct the entire income from its holdings of municipal securities, rather than just the portion of such income as was allocated to the company (as opposed to its policyholders) by the Life Insurance Company Income Tax Act of 1959.

The issue here is not the constitutional limit of a state's ability to tax federal debt, but rather the extent of a *statutory* prohibition against state taxation of federal obligations (Rev. Stat. § 3701) which is broader than the constitutional prohibition. Compare *American Bank* with *Des Moines National Bank v. Fairweather,* 263 U.S. 103 (1923).

In *Atlas Life* the Life Insurance Company Income Tax Act specified an allocation method and provided that the method was to be applied to "[t]he policyholders' share of each and every item of investment yield (including tax-exempt interest, partially tax-exempt interest, and dividends received) . . . ." 26 U.S.C. § 804(a)(1). As this Court pointed out in *Atlas Life,* Congress specifically considered the argument that the failure of the formula to assign all exempt income to the company would burden municipal debt, and decided to use the formula despite that objection. 381 U.S. at 239-43. Rev. Stat. § 3701, on the other hand, makes no reference at all to an allocation formula, and in fact forbids "every form of taxation that would require that . . . the obligations . . .be considered, directly or indirectly, in the computation of the tax. . . ." Congress' purpose in enacting that law, as this Court held in *American Bank,* was to establish a sweeping exemption for federal obligations from every form of state taxation other than franchise and inheritance taxes. Rev. Stat. § 3701 necessarily disapproves apportionment by banning any computation that even considers federal obligations.

Atlas Life also fails to furnish a precedent for a proportionate deduction here because *Atlas Life* involved application of an "*on*" test, the very test which *American Bank* held to have been rejected by the 1959 amendment to Rev. Stat. § 3701. The issue in *Atlas Life* was whether the allocation contained in the Life Insurance Company Income Tax Act "places an impermissible tax *on* the interest earned by life insurance companies from municipal bonds. . . ." 381 U.S. at 236. (Emphasis added). The 1959 amendment to Rev. Stat. § 3701, however, "abolished the formalistic inquiry whether the tax is *on* a distinct interest, and replaced it with the inquiry whether 'computation of the tax' requires consideration of federal obligations." *American Bank*, 103 S.Ct. at 3377. (Emphasis in original).

Although the apportionment formula approved in *Atlas Life* was held not to impose a tax "on" tax-exempt obligations, this formula does not satisfy the more demanding requirement of Rev. Stat. § 3701. Indeed, the Court noted in *Atlas Life* that "[u]ndoubtedly the 1959 [Life Insurance Company Income Tax] Act *does not wholly ignore* the receipt of tax-exempt interest in arriving at taxable investment income." 381 U.S. at 251. (Emphasis added). *Atlas Life* thus indicates that when a proportionate deduction theory is used, federal obligations are not being "wholly ignore[d]," as Rev. Stat. § 3701 has been shown to require.

For all these reasons, the Supreme Court of Georgia erred in suggesting that *Atlas Life* authorized the use of a proportionate deduction under Rev. Stat. § 3701.

D. The Proportionate Deduction Approach Improperly Allows The States To Determine Arbitrarily The Extent To Which Federal Obligations Will Be Exempt From State Taxation.

Rev. Stat. § 3701 forbids "every form of [state] taxation that would require that . . . [federal] obligations . . . be

considered, directly or indirectly, in the computation of the tax." The statute by its terms relieves the Court from having to address what Chief Justice Marshall described as "the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435 (1819).[12] In a variation on that theme in the *Bank of Commerce* case, the Court observed that "if the encroachment or usurpation to any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of the power." 67 U.S. (2 Black) at 633. Rev. Stat. § 3701 expresses at a minimum Congress' agreement with the proposition that state and local efforts to involve or consider federal obligations in a tax base should not be permitted in any degree.

The decision below, and the efforts of taxing authorities in other states to avoid the command of Rev. Stat. § 3701 as construed in *American Bank*, suggests that the plain meaning of Rev. Stat. § 3701 requires further emphasis.

The Georgia taxing authorities proposed one method for treating federal obligations in the wake of the *American Bank* case.[13] The Georgia Supreme Court chose not to

---

[12] Chief Justice Marshall later expressed the same concern with specific reference to local efforts to tax federal debt in *Weston v. City Council of Charleston* where, in striking the municipal tax at issue, he observed that, "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits." 27 U.S. (2 Pet.) at 174.

[13] The taxing authorities proposed that a proportionate deduction for federal obligations be calculated by multiplying an "adjusted statutory tax base" by the ratio of federal obligations to total assets other than those excluded by state law. See "Brief of Appellee Taxing Authorities on the Question of Remedy," filed in

(Continued on following page)

use that method, but to develop another approach of its own.[14] In Pennsylvania, the legislature has enacted its own proportionate deduction.[15] In Montana, an exclusion is recognized for income from federal obligations, but such income is effectively recaptured by a statute that now requires deductions otherwise available to be reduced where federal obligation income is excluded.[16] In Tennessee[17] and Louisiana,[18] taxing authorities at the state level have urged limiting the deductions for income from federal obligations, arguing that expenses, like liabilities in the case of a net assets tax, ought to be used to reduce the federal obligation income exclusion proportionately. In Texas,[19] federal obligations are treated in no fewer than three different ways, each having the effect of reincluding them in the state tax base.

All of these methods arbitrarily determine the extent to which federal obligations are to go untaxed. The proportionate deduction method created by the Georgia Supreme Court, for example, denies a complete exclusion for federal obligations on the arbitrary theory that a bank's federal obligations are directly offset by a proportion of its liabilities, and that deduction of only a mathematically corresponding share of liabilities eliminates the federal obligations from consideration in the tax base.[20] Most liabilities, however, patently have no relation to federal obligations — *e.g.*, mortgage debt, trade payables, and the like. They are nonetheless all partially attributed, by the decision below, to federal obligations. Indeed, the Georgia method allocates a portion of a bank's accrued state tax liabilities (including even bank share tax liability) to federal obligations, so that the very method that is claimed to avoid state taxation of federal obligations in fact burdens those obligations with an allocated portion of accrued state tax liabilities.

To approve the Georgia Supreme Court's proportionate deduction is to open the door to any number of other arbitrary methods that purport to exclude, but in fact include, federal obligations in the computation of a state or local tax. In revising Rev. Stat. § 3701, Congress meant to do away with "formalistic" contrivances that undercut the immunity it wished to confer on federal obligations. *See American Bank*, 103 S.Ct. at 3374. The Georgia approach not only constitutes such a device, but fails, as shown, even

---

the Supreme Court of Georgia on September 12, 1983, at 19-20. Use of that formula would have resulted, in the case of the bank used as an example by the Supreme Court of Georgia, in a deduction of only $83,461, as compared with the $203,043 deduction available to the same bank under the Georgia Supreme Court method.

[14] See *Bartow County Bank*, 251 Ga. at 835-36, 312 S.E.2d at 106 (J.S. App. at A-7).

[15] Laws of Pa., Act. 1953-66 (amending Act of Mar. 4, 1971 (P.L.6, No. 2).

[16] Mont. Code Ann. § 15-31-116 (enacted as Sec. 1, Ch. 673, L. 1983)

[17] See Jurisdictional Statement at 7 n. 7.

[18] See "Brief by Petitioners in American Bank & Trust Company v. Dallas County as Amici Curiae", filed herein on July 13, 1984, at 6.

[19] See *id.* at 5 n.2.

[20] The Georgia court noted in its analysis that "[t]he nature of a balance sheet is such that so much of a bank's assets as consist of federal obligations are represented by an equivalent amount of liabilities (resulting in those assets not being taxed) and net worth (resulting in those assets being taxed)." *Bartow County Bank*, 251 Ga. at 833, 312 S.E.2d at 105 (J.S. App. at A-4).

theoretically to remove federal obligations from the tax base.[21]

The only way federal obligations can be eliminated, in accordance with the command of Rev. Stat. § 3701, is to exclude them entirely before computation of the value of the shares. Only that method prevents the obligations from being taken into account, leaving the states, as Congress intended, without any latitude to tax them to any degree.

---

[21] The Georgia approach also violates Congress' intent that the "investment attractiveness" of federal obligations not be adversely affected "in the slightest degree" by state or local taxation. *See Memphis Bank*, 103 S.Ct. at 695; *New Jersey Realty Title*, 338 U.S. at 675; *Smith* v. *Davis*, 323 U.S. at 117. Under the Georgia Supreme Court approach, a federal obligation's investment attractiveness depends as much on a bank's ratio of federal obligations to total assets as it does on the obligation's effective yield.

The formula of the court below is as follows: Tax Base = Net Worth − [(Federal Obligations ÷ Total Assets) × Net Worth]. For example, consider three banks, each with a net worth of $100,000 and with assets, respectively, of $500,000, $1,000,000, and $1,500,000. If each bank purchases a $10,000 Treasury bond out of cash, the effective yield on that bond will depend solely (assuming a constant tax rate) on the amount of that bank's total assets. The formula used by the court below would produce deductions on account of the Treasury bond of $2,000, $1,000 and $667, respectively, for the three banks. The value and investment attractiveness of the bonds is therefore less for the bank with $1,500,000 in assets than it is for the bank with $500,000 in assets. Moreover, on the day a bank considers investing in the $10,000 Treasury bond, it cannot determine what its after-tax yield will be because it does not know what its balance sheet will look like on tax day.

CONCLUSION

For these reasons, the Court should reverse the decision of the Supreme Court of Georgia, and remand the cause with a direction that federal obligations be fully excluded from total assets, and thus from net worth, in computing the bank share tax base.

Respectfuly submitted,

CHARLES T. ZINK
L. TRAMMELL NEWTON, JR.

HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
(404) 581-8000

July 13, 1984

AMICUS CURIAE

BRIEF

No. 83-1620

In the Supreme Court of the United States

OCTOBER TERM, 1984

FIRST NATIONAL BANK OF ATLANTA, ETC.,
APPELLANT

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS, ET AL.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

MICHAEL L. PAUP
ERNEST J. BROWN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Supreme Court of Georgia erred in holding that, for purposes of computing the state tax on bank shares, measured by the bank's net worth, Rev. Stat. § 3701 (as amended in 1959) does not require that the assets taken into account in computing the bank's net worth be reduced by the amount of the obligations of the United States held by the bank, but rather permits a reduction by only that fraction of the net worth that United States obligations constitute of the bank's total assets.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Opinions below	2
Jurisdiction	3
Constitutional provisions and statute involved	3
Statement	4
Summary of argument	6
Argument:	
The Georgia bank share tax applied by the court below is inconsistent with Rev. Stat. § 3701	8
Conclusion	17

TABLE OF AUTHORITIES

Cases:

American Bank & Trust Co. v. *Dallas County*, No. 81-1717 (July 5, 1983)	*passim*
Bank of Commerce v. *New York City*, 67 U.S. (2 Black) 620	13
Bank Tax Case, 69 U.S. (2 Wall.) 200	13
Holland v. *United States*, 348 U.S. 121	10
McGarry v. *United States*, 388 F.2d 862	10
New Jersey Realty Title Ins. Co. v. *Division of Tax Appeals*, 338 U.S. 665	7, 13, 14
Smith v. *Davis*, 323 U.S. 111	15
Society for Savings v. *Bowers*, 349 U.S. 143	14
United States v. *Atlas Life Ins. Co.*, 381 U.S. 233	16
W. H. Miner, Inc. v. *Peerless Equipment Co.*, 115 F.2d 650	10
Weston v. *City Council*, 27 U.S. (2 Pet.) 449	14

Constitution, statutes and regulation:

U.S. Const.:	
Art. I, § 8, Cl. 2	3
Art. VI, Cl. 2	3

Constitution, statutes and regulation—Continued: Page

Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105 (a), 73 Stat. 622 8
Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124 (a), 96 Stat. 945 4
Internal Revenue Code of 1954, 26 U.S.C.:
§ 341(e)(7) 10
§ 804 16
Rev. Stat. § 3701 (1878 ed.) 8
Rev. Stat. § 3701 (1878 ed.), as amended by the Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105 (a), 73 Stat. 622 ..... *passim*
31 U.S.C. 3124(a) 3
1933 Ga. Laws § 91A-3301(b) 4
Ga. Code Ann. (1982):
§ 48-6-90 4
§ 48-6-90(a) 4
§ 48-6-90(b) 4
Treas. Reg. § 1.341-6(j) 10

Miscellaneous:

Bureau of Gov't Financial Operations, Office of the Secretary, U.S. Dep't of Treasury, *Treasury Bulletin* (1st Quarter FY 1984) 2
19 W. Fletcher, *Cyclopedia of the Law of Private Corporations* (1975) 10
H.R. Rep. 1148, 86th Cong., 1st Sess. (1959) 13
Public Debt Ceiling and Interest Rate Ceiling on Bonds: Hearings Before the House Comm. on Ways and Means, 86th Cong., 1st Sess. (1959) .. 13
S. Rep. 909, 86th Cong., 1st Sess. (1959) 13

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1620

FIRST NATIONAL BANK OF ATLANTA, ETC., APPELLANT

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS, ET AL.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT

INTEREST OF THE UNITED STATES

After this Court's decision in *American Bank & Trust Co.* v. *Dallas County*, No. 81-1717 (July 5, 1983), in which the United States participated as amicus curiae at the invitation of this Court, this case was remanded to the Supreme Court of Georgia for further consideration in light of *American Bank* (J.S. App. A9). On remand, the Supreme Court of Georgia acknowledged that its prior decision permitting computation of Georgia's tax on bank shares

without consideration of the amount of obligations of the United States held by the bank was inconsistent with this Court's decision in *American Bank* (J.S. App. A2-A3). Nonetheless, the court largely adhered to the result of that prior decision by now holding that, in the imposition of the State's tax on bank shares, only a portion of the obligations of the United States held by the bank need be excluded from the computation; the greater part (90.25% in an example employed by the court) could be taken into account in computing the tax.

We are informed by the Department of the Treasury that, as of December 1983, $1,022.6 billion of federal obligations were privately held, of which $188.9 billion were held by commercial banks.[1] To the extent that such obligations are taken into account in the computation of state or local taxes, their marketability is diminished and the cost of borrowing by the United States is enhanced to a significant, if not precisely measurable, extent. Hence, the United States has an important interest in the question whether Rev. Stat. § 3701, as amended in 1959, permits the computation method applied below.

OPINIONS BELOW

The original opinion of the Supreme Court of Georgia (J.S. App. A10-A23) is reported at 248 Ga. 703, 285 S.E.2d 920. The opinion on remand from this Court (J.S. App. A1-A8) is reported at 251 Ga. 831, 312 S.E.2d 102.

---

[1] See Bureau of Gov't Financial Operations, Office of the Secretary, U.S. Dep't of Treasury, *Treasury Bulletin* 31 (1st Quarter FY 1984).

JURISDICTION

The judgment of the Supreme Court of Georgia was entered on January 4, 1984. Notices of appeal to this Court were filed in the Supreme Court of Georgia and in the Superior Court of Bartow County on March 2, 1984 (J.S. App. A24, A25). The jurisdictional statement was filed on April 3, 1984, and this Court noted probable jurisdiction on May 29, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Constitution of the United States:

Art. I, § 8, Cl. 2:

> The Congress shall have Power * * * To borrow Money on the credit of the United States[.]

Art. VI, Cl. 2:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Rev. Stat. § 3701 (1878 ed.), as amended by the Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105(a), 73 Stat. 622:[2]

---

[2] As noted by this Court in its *American Bank* opinion (slip op. 2 n.1), Rev. Stat. § 3701 was succeeded by 31 U.S.C. 3124(a) when Title 31 of the United States Code was en-

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

Ga. Code Ann. § 48-6-90 (1982) is set forth at J.S. App. A26-A29.

STATEMENT

The First National Bank of Cartersville, Georgia (Bank), to which appellant is the successor in interest, filed with local taxing authorities its 1980 "Determination of Taxable Value of Bank Shares," as required by 1933 Ga. Laws § 91A-3301(b), codified at Ga. Code Ann. § 48-6-90(b) (1982) (see J.S. App. A27). Section 48-6-90(a) imposes upon bank shares a tax "at their fair market value, which shall be determined by adding together the amount of the capital stock, paid-in capital, appropriated retained earnings, and retained earnings * * *." This figure represents what is commonly called "net worth." See J.S. App. A2. Relying on Rev. Stat. § 3701, as amended, in its 1980 return the Bank deducted from this figure the value of obligations of the United States owned by it. That deduction, along with similar deductions by two other banks, was disallowed by the Bartow County Board of Tax Assessors.

---

acted into positive law without substantive change on September 13, 1982, subsequent to the year here involved. See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3124(a), 96 Stat. 945.

All three banks appealed to the Board of Equalization, which decided against the Bank and (because different panels heard the cases) one of the other two banks. The three cases were consolidated on appeals to the Superior Court of Bartow County, which held that the banks could not deduct the value of federal obligations in determining net worth for purposes of the share tax (see J.S. App. A12-A13). The Supreme Court of Georgia affirmed (J.S. App. A10-A23). On appeals to this Court (No. 81-1834), the judgment of the Supreme Court of Georgia was vacated, and the case was remanded to that court for further consideration in light of this Court's decision in *American Bank & Trust Co.* v. *Dallas County*, No. 81-1717 (July 5, 1983) (J.S. App. A9).

On remand, the Supreme Court of Georgia adhered in large part, although not entirely, to its initial result. The court acknowledged that its prior decision approving a complete failure to consider federal obligations was incorrect and that *American Bank* demonstrated that the Georgia statute "is unconstitutional unless it be construed so that the value of federal obligations which the banks hold not be considered, directly or indirectly, in computing the tax" (J.S. App. A2). Nevertheless, the court rejected the Bank's claim that federal obligations should be deducted in full in the computation of the tax. The court explained that "we deal here with a value tax measured by net worth, rather than by total assets. The law commands that we exclude federal obligations from the tax base, which is to say, that we exclude federal obligations from net worth to the extent that they are represented

therein." *Id.* at A4. The court then held that Rev. Stat. § 3701, as amended, required only a proportionate deduction—*i.e.*, that net worth be reduced by that fraction that United States obligations owned by the bank constituted of the bank's total assets. Thus, in the example used by the court of the Citizens and Southern Bank of Bartow County (C & S Bank), the $1,995,393 of federal securities owned by the C & S Bank constituted 9.75% of total assets of $20,463,522; hence, the court held that only 9.75% of its net worth of $2,082,488, or $203,043, was represented by federal securities and had to be deducted in the computation of taxable net worth, rather than the entire $1,995,393 of the United States obligations (J.S. App. A4-A7). The Bank's successor in interest again appeals, arguing that this revised reading of the Georgia statute also violates Rev. Stat. § 3701.

SUMMARY OF ARGUMENT

Rev. Stat. § 3701, as amended, provides a state tax exemption for federal obligations from "every form of taxation" that would require the obligations to "be considered, directly or indirectly, in the computation of the tax." The Georgia bank share tax approved below, which is based on the net worth of the bank, reduced by only a fraction of the obligations of the United States held by the bank, violates this provision. The fundamental flaw in the decision of the court below is its acceptance of net worth as a given figure, without examining how that figure was obtained.

In fact, the net worth of a corporation essentially represents the sum of its assets minus its liabilities. Thus, the net worth figure that the court below took as the base from which further computation of the

bank share tax proceeded included all of the obligations of the United States held by the bank. This net worth figure is a necessary figure "in the computation of the tax," and, in order to comply with the amended Rev. Stat. § 3701, it is therefore necessary to exclude obligations of the United States from the computation of net worth. This the court below failed to do. And, contrary to the suggestion below, it is not disproportionate to subtract the full amount of the federal obligations, rather than a fraction, from net worth; that subtraction simply substitutes for the failure to subtract the obligations from total assets at the beginning of the net worth calculation.

This Court has long held that a state tax on a corporation's assets, or on its capital, or capital and surplus, is invalid insofar as obligations of the United States are included in the computations by which the amount of the tax is ascertained. Specifically, if the Georgia tax were imposed directly upon the net worth of the bank, a full deduction for the obligations of the United States would have to be allowed. *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665, 672-673 (1950). Under this Court's recent decision in *American Bank & Trust Co.* v. *Dallas County*, No. 81-1717 (July 5, 1983), it is clear that the same result must obtain when the tax is on the bank's shares valued by net worth. The tax here plainly reduces the investment value of federal obligations, and it indisputably takes into account a large portion of those obligations (90.25% in the example used by the court) in computing the tax. Hence, it violates both the purpose and the letter of Rev. Stat. § 3701.

ARGUMENT

THE GEORGIA BANK SHARE TAX APPLIED BY THE COURT BELOW IS INCONSISTENT WITH REV. STAT. § 3701

Prior to 1959, Rev. Stat. § 3701 had provided in general terms for the exemption of obligations of the United States from taxation under State or municipal or local authority. By the Act of Sept. 22, 1959, Pub. L. No. 86-346, § 105(a), 73 Stat. 622, Congress significantly expanded the coverage of the statute. With exceptions not here relevant, the amended Section 3701 provides:

> This exemption extends to every form of taxation that would require that either the obligations [of the United States] or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax * * *.

In *American Bank & Trust Co.* v. *Dallas County*, No. 81-1717 (July 5, 1983), slip op. 5, the Court explained that the exemption provided by the amended statute is "sweeping," and it held that the amendment rejected the Court's earlier approval of bank share taxes that did not provide a deduction for the amount of federal obligations held by the bank. The Court in *American Bank* therefore held invalid the Texas bank share tax involved there, noting incidentally that the Georgia bank share tax involved here used the same method for assessing the value of bank shares as the invalid Texas statute. *Id.* at 9 n.9.

On remand from this Court in light of *American Bank*, the Georgia Supreme Court conceded that its earlier decision upholding the Georgia bank share tax (J.S. App. A10-A23) was erroneous. However, the court reinterpreted that statute to establish a

different method of computing the tax and concluded that this revised method is consistent with Rev. Stat. § 3701 even though it provides only a small deduction for federal obligations and hence yields substantially the same tax result as the invalidated method that completely ignored the existence of federal obligations.

The Supreme Court of Georgia rationalized its substantial adherence to its prior decision by explaining that "we deal here with a value tax measured by net worth, rather than by total assets" (J.S. App. A4). The court's analysis simply accepted net worth as a given figure, without examining or questioning how that figure was computed. The court then attributed to that net worth only a small percentage of the obligations of the United States held by the bank (corresponding to the percentage of the bank's total assets that were United States obligations). Using the figures of C & S Bank as an example, the court took $2,082,488 as its given net worth. Since C & S's $1,995,393 of federal obligations constituted 9.75% of the bank's total assets of $20,463,522, the Court attributed 9.75% of those obligations, or $203,043, to the bank's net worth. Therefore, the court held that, in measuring the value of C & S's shares, Rev. Stat. § 3701 would be satisfied if the bank's net worth of $2,082,488 were reduced by only $203,043 by virtue of its ownership of $1,995,393 in obligations of the United States. See J.S. App. A7. This holding, like the court's prior decision upholding the Georgia statute, cannot be squared with the terms of Rev. Stat. § 3701 and the decisions of this Court.

Rev. Stat. § 3701, as amended, unequivocally states that the exemption extends to "every form of taxation" that requires that the United States obliga-

tions "be considered, directly or indirectly, in the computation of the tax." As this Court explained in *American Bank*, "[i]n context, the word 'considered' means taken into account, or included in the accounting." Slip op. 6 (footnote omitted). It cannot seriously be doubted that the federal obligations are taken into account in computing the Georgia bank share tax; indeed, counting those obligations is an essential part of the process.

The fundamental flaw in the decision below is that the Georgia Supreme Court arbitrarily began its analysis with the net worth figure without discussing the origin of that figure. But "net worth" is not a number that comes out of thin air, it is intimately connected with other data. Specifically, the net worth of a corporation (or of a person) is the sum of its assets (computed on the basis either of cost or of value), minus its liabilities or, as this Court put it in *Holland* v. *United States*, 348 U.S. 121, 125 (1954), the "total net value of the taxpayer's assets."[8] Thus, the first step in the process of computing the bank share tax is determining the total assets of the bank so that net worth can be calculated. It necessarily follows that, to use the statutory phrase, "in the computation of" the amount of the

[8] See also 19 W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 9236, at 428 (1975) (footnotes omitted); ("The term 'net worth' of a corporation generally means the difference between the assets and liabilities of the corporation, and as used in a contract the term has been construed as equivalent to the book value of the corporation."); *McGarry* v. *United States*, 388 F.2d 862, 864 (1st Cir. 1967); *W. H. Miner, Inc.* v. *Peerless Equipment Co.*, 115 F.2d 650, 655 (7th Cir. 1940); Internal Revenue Code of 1954, 26 U.S.C. 341(e)(7); Treasury Regulations on Income Tax (1954 Code), 26 C.F.R. 1.341-6(j).

Bank's net worth here, all of the obligations of the United States owned by the Bank were included. That net worth is an indispensable, albeit not the ultimate, figure that must be employed in the computation of Georgia's tax under the interpretation of the court below. This inclusion of federal obligations in the computation of the amount of the Bank's net worth therefore violates the explicit terms of Rev. Stat. § 3701, as amended. In order to comply with the statute, the amount of the obligations of the United States owned by the Bank should be excluded in the initial computation of the amount of the Bank's net worth, the base figure from which further computation proceeds.

The Georgia Supreme Court's conclusion that the "proportionate deduction" method it employed is valid seems to stem from the view that it would be somehow "disproportionate" to subtract the full value of the United States obligations from the net worth figure, since that figure is so much smaller than the total assets of the bank. In the words of the Georgia court, it is not appropriate to subtract the full value of the federal obligations because "only a portion of the federal obligations are attributable to net worth" (J.S. App. A4). But this approach completely misses the point. To the extent that it seems disproportionate to subtract the federal obligations from the smaller net worth figure, that is an illusion because that subtraction simply corrects the failure to subtract those obligations from total assets initially when computing the net worth figure. Obviously, it is not "disproportionate" to subtract the total value of the federal obligations from the bank's total assets at the outset. The final result of subtracting the federal obligations from the net worth

figure at the end is the same, and hence the method proposed by appellant properly accounts for the federal obligations exemption.[4]

Conversely, the Georgia court's "proportionate deduction" method results in a higher taxable net worth, and hence higher tax, than if the federal obligations were not included in total assets; therefore, that method is a form of taxing federal obligations.[5] In short, to take the bank's net worth as a given, without reference to Rev. Stat. § 3701 or to the obligations of the United States owned by the bank, is simply to ignore the provisions of Rev. Stat. § 3701. The formulation of the 1959 amendment to Rev. Stat. § 3701 in terms of computation of the tax was designed to make the exemption for obligations

---

[4] Significantly, it has never been suggested that the Georgia statutory deduction for real estate be made through the "proportionate deduction" method. Rather, the full value of real estate is deducted from net worth. The Georgia Supreme Court's explanation of this discrepancy is wholly unconvincing. See J.S. App. A6. The court points out that real estate is taxed separately, but that is not a genuine distinction; to the contrary, it highlights the fact that real estate and federal obligations ought to be treated alike for these purposes. Because real estate is taxed separately, it should not be taxed at all under the bank share tax. The way this complete exemption is accomplished is by deducting the value of real estate fully from net worth. By the same token, federal obligations, which may not be taxed at all under the bank share tax, must also be deducted fully from net worth.

[5] Indeed, the Georgia court indirectly exposes the fallacy in its approach by acknowledging (J.S. App. A4 n.3) that banks that could show that federal obligations were purchased from capital stock or surplus might be entitled to a complete deduction. Plainly, the protections of Rev. Stat. § 3701 should not vary depending on the label of the fund out of which they were purchased.

of the United States a thorough protection and to prevent avoidance or circumvention by such formalistic devices of characterization or hypothetical allocations as those engaged in by the court below. See H.R. Rep. 1148, 86th Cong., 1st Sess. 2, 8, 12 (1959); S. Rep. 909, 86th Cong., 1st Sess. 2, 8, 11 (1959); *Public Debt Ceiling and Interest Rate Ceiling on Bonds: Hearings Before the House Comm. on Ways and Means*, 86th Cong., 1st Sess. 71, 72 (1959). The Georgia bank share tax cannot satisfy the strictures of Rev. Stat. § 3701 unless the full amount of the federal obligations held is deducted from the total assets that form the basis for the net worth computation; the contrary decision below simply invites state legislatures and courts to devise ingenious methods of partially counting federal obligations in the tax base.

The decisions of this Court fully support the result indicated by the plain language of Rev. Stat. § 3701. As this Court pointed out in its opinion in *American Bank* (slip op. 6-7, 9-10), the Court has long and consistently held that a tax directly on a corporation computed on the amount of the corporation's net worth (see *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665, 672-673 (1950)), or its capital (*Bank of Commerce* v. *New York City*, 67 U.S. (2 Black) 620 (1863)), or its "capital stock paid in" (*Bank Tax Case*, 69 U.S. (2 Wall.) 200, 207 (1865)) is invalid insofar as obligations of the United States are included in the computations by which the amount of the tax is ascertained. In each of those cases, the Court held that the amount on which the tax was computed was required to be reduced by the amount of obligations of the United States owned by the corporation. See also

Society for Savings v. *Bowers*, 349 U.S. 143, 147-148 (1955); *Weston* v. *City Council*, 27 U.S. (2 Pet.) 449 (1829).

If the tax had been imposed directly on the net worth of the banks in this case, the amount on which the tax was computed would have had to be reduced by the amount of the obligations of the United States held by the banks. *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, *supra*. Prior to 1959, a different result would have obtained for a tax on bank shares, but *American Bank* makes clear that the 1959 amendment obliterated this distinction between a tax on the bank's assets and a tax on the bank's shares whose value is measured by the underlying assets. Thus, as in *New Jersey Realty*, in computing Georgia's tax on bank shares, the value of the shares subject to tax must be ascertained by first removing from the computation all of the obligations of the United States held by the banks. To do otherwise would severely undercut the decision in *American Bank* and mark a return to the pre-1959 "formal but economically meaningless distinction between taxes on government obligations and taxes on separate interests." *American Bank*, slip op. 2; see also *Society for Savings* v. *Bowers*, 349 U.S. at 148. Rather, as the Court in *American Bank* explained, the statute explicitly prohibits the tax assessment upheld below because a "tax is barred regardless of its *form* if federal obligations must be considered, either directly or indirectly, in *computing* the tax." Slip op. 6 (emphasis in original).

Moreover, appellees accept, at least for purposes of argument, that the tax challenged here will decrease the marketability or investment value of federal obligations. Motion to Dismiss 8.[6] Thus, it is clear that the tax computation does not use the federal obligations in some tangential way; rather the tax here goes to the core of the purpose underlying Rev. Stat. § 3701, viz., "to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *Smith* v. *Davis*, 323 U.S. 111, 117 (1944).

"Section 3701 prohibits any form of tax that would require consideration of federal obligations in computing the tax; it cannot matter whether such consideration is mandated by the tax assessor in practice or by the state statute in so many words." *American Bank*, slip. op. 9 (footnote omitted). By the same token, it cannot matter whether such consideration is mandated by statutory construction in the state courts. The Supreme Court of Georgia has construed the Georgia statute to require that obligations of the United States held by a bank be taken fully into account in computing the net worth of the bank, and that that net worth then be reduced, in computing the amount of the tax, by only a fraction of the obligations of the United States held by the bank, *i.e.*, by that fraction that the obligations of the

---

[6] It seems clear enough that the investment attractiveness of federal obligations under appellant's submission, which gives full credit for such obligations, is greater than under the "proportionate deduction" method. Appellees are of course correct that this tax advantage evaporates when the bank in question reaches a point where it no longer has to pay any tax. See Motion to Dismiss 8-9 n.4. But the same can be said about any situation where Rev. Stat. § 3701 applies. The critical fact is that, until that "no tax" point is reached, the decision below decreases the marketability of federal obligations.

United States constitute of the total assets of the bank. In the example employed by the court (J.S. App. A7), where obligations of the United States represented 9.75% of the total assets of the bank, 100% of those obligations were taken into account in determining the net worth of the bank, and that figure was then reduced by the amount of 9.75% of those obligations, leaving 90.25% of the obligations of the United States having been taken into account, directly or indirectly in the computation of the tax on bank shares. The decision of the Supreme Court of Georgia is therefore inconsistent with the decision of this Court in *American Bank*, and with the explicit provisions of Rev. Stat. § 3701, as amended in 1959.[7]

---

[7] *United States* v. *Atlas Life Ins. Co.*, 381 U.S. 233 (1965), on which the court below relied (J.S. App. A5), has no bearing on this case. That case involved the constitutionality of Section 804 of the Internal Revenue Code of 1954 (26 U.S.C.), calling for a division of a life insurance company's investment income, including income from municipal bonds, into two parts, the company's share and the policyholders' share, and the tax computations dependent thereon. It in no way involved Rev. Stat. § 3701, which deals with state taxation of federal obligations. In *Atlas Life* the question was not of statutory construction but of the constitutionality of a statute unrelated to this case. The constitutional standard applied there does not control the question presented here of the construction and application of Rev. Stat. § 3701 to the particular facts in this case. In any event, the proration in *Atlas Life* was justified to avoid a double exemption; as explained above, appellant here seeks only to exempt the full value of federal obligations once from the total assets used to calculate net worth.

CONCLUSION

The judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALAN I. HOROWITZ
Assistant to the Solicitor General

MICHAEL L. PAUP
ERNEST J. BROWN
Attorneys

JULY 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 10007

AMICUS CURIAE

BRIEF

No. 83-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

BRIEF BY PETITIONERS IN AMERICAN BANK & TRUST CO. v. DALLAS COUNTY AS AMICI CURIAE IN SUPPORT OF APPELLANT

MARVIN S. SLOMAN*
BRIAN M. LIDJI
Carrington, Coleman,
Sloman & Blumenthal
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201
(214) 698-8000
**Counsel of record*

PETER S. CHANTILIS
CECILIA H. MORGAN
Chantilis & Morgan
8150 North Central Expwy.
Dallas, Texas 75206

ROY C. COFFEE, JR.
CHRISTOPHER G. SHARP
Coffee, Coffee, & Sharp
6201 Hillcrest
Dallas, Texas 75205

BRUCE W. BOWMAN, JR.
Vial, Hamilton, Koch, Tubb & Knox
1500 RepublicBank Tower
Dallas, Texas 75201

July 13, 1984

QUESTION PRESENTED

Whether Rev. Stat. § 3701 is violated by a state bank share tax computed with only a partial deduction of the bank's federal obligations rather than a complete elimination of the value of the federal obligations from the value of the shares?

AMICI CURIAE

The following state and national banks were the petitioner banks in the case of *American Bank & Trust Co. v. Dallas County*, 103 S.Ct. 3369 (1983), and are the amici curiae here. The names in parentheses are the present names of banks that have changed the name under which they do business since the commencement of the *American Bank & Trust Co.* case.

American Bank and Trust Company (InterFirst Bank Oak Cliff)
American National Bank of Garland
Bank of Dallas
Bank of Texas
Brookhollow National Bank
Canyon Creek National Bank
Capital Bank
Century Bank and Trust Company
Citizens National Bank of Dallas (Cullen/Frost Bank of Dallas, N.A.)
Dallas International Bank
Dallas National Bank (RepublicBank Dallas East, N.A.)
Equitable Bank
First Citizens Bank
First City Bank of Dallas
First Continental Bank (Allied Bank – Southwest)
First National Bank in Dallas (InterFirst Bank Dallas, N.A.)
First National Bank in Garland (RepublicBank Garland, N.A.)
First National Bank of Lancaster
First Security Bank of Dallas, N.A. (First City Bank – Market Center, N.A.)
First Security Bank of Garland, N.A. (First City Bank of Garland, N.A.)
First Texas Bank
Garland Bank and Trust Co.
Grand Avenue Bank (Grand Bank)
Greenville Avenue Bank and Trust (RepublicBank Greenville Avenue)
Grove State Bank (InterFirst Bank Pleasant Grove)
Inwood National Bank of Dallas
Lakewood Bank and Trust Company (Allied Lakewood Bank)

Love Field National Bank
Mercantile National Bank at Dallas
Metro Bank of Dallas (Allied Bank of Dallas)
National Bank of Commerce of Dallas (BancTexas Dallas N.A.)
North Dallas Bank & Trust Co.
NorthPark National Bank of Dallas
Oak Cliff Bank and Trust Company (RepublicBank Oak Cliff)
Pan American National Bank of Dallas
Park Cities Bank (InterFirst Bank Park Cities)
Preston State Bank
Prestonwood National Bank (Texas American Bank/Prestonwood, N.A.)
Republic National Bank of Dallas (RepublicBank Dallas, N.A.)
Reunion Bank
Texas American Bank, Dallas North
Texas Commerce Bank – Campbell Centre, N.A.
Texas Commerce Bank – Casa Linda, N.A.
Texas Commerce Bank – Dallas, N.A.
Texas Commerce Bank – Garland
Texas Commerce Bank – Northwest, N.A.
Texas Commerce Bank – Park Central, N.A.
Texas Commerce Bank – Preston Royal, N.A.
Trinity National Bank of Dallas
Valley View Bank (First City Bank – Valley View)
White Rock Bank of Dallas (BancTexas White Rock)
Wynnewood Bank & Trust

The following class representatives were petitioners in *American Bank & Trust Co.* on behalf of themselves and of all the shareholders of the above listed banks as of January 1, 1980, and are amici curiae here.

Richard M. Hart
Frank Marshall
Ronald G. Steinhart
Peyton Cooper
Charles N. Brewer
Lynn D. Turner
A. A. Walker
Woodrow Brownlee

INTEREST OF AMICI CURIAE

These amici have an interest in the question presented because of the question's involvement in the following Texas proceedings to which they are parties: (1) The respondent taxing authorities in *American Bank & Trust Co.* have cited the Georgia decision in the present case to the Texas Court of Appeals at Dallas, where the *American Bank & Trust Co.* case has continued to pend without action by the Court of Appeals for nearly a year since remand by this Court. (2) In the district court case described in footnote 1 at p. 5 of this brief, the question is directly at issue for tax year 1983. (3) A percentage formula is being used in Dallas County to assess these amici for tax year 1984, and is presently being challenged on appeal to the Dallas County Appraisal Review Board.

TABLE OF CONTENTS

	Page
Question Presented	i
Amici Curiae	ii
Interest of Amici Curiae	iv
Table of Contents	v
Table of Authorities	v
Brief by Petitioners in American Bank & Trust Co. v. Dallas County as Amici Curiae in Support of Appellant	1
Summary of the Argument	2
Argument	2
Conclusion	7

TABLE OF AUTHORITIES

Case	
American Bank & Trust Co. v. Dallas County, 103 S.Ct. 3369 (1983)	passim
Statutes	
Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 622	2
Rev. Stat. § 3701	2
La. Rev. Stat. Ann. § 47:1967	6
Laws of Pa., Act 1983-66	6
Other Authorities	
Texas House of Representatives, House Study Group Report, *The Bank-Shares Tax* (Nov. 22, 1983)	4
Texas Research League, Report to the Select Joint Committee on Fiscal Policy, *Status of the Texas Bank Shares Tax* (June 14, 1984)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

BRIEF BY PETITIONERS IN AMERICAN BANK & TRUST CO. v. DALLAS COUNTY AS AMICI CURIAE IN SUPPORT OF APPELLANT

The banks and class representatives who were petitioners in *American Bank & Trust Co. v. Dallas County,* No. 82-1717, 103 S.Ct. 3369 (1983), respectfully urge the Court to reverse the decision below.

The Brief of Appellant correctly sets forth the Opinions Below, Jurisdiction, Statutes Involved, and Statement of the Case.

SUMMARY OF THE ARGUMENT

Rev. Stat. § 3701 forbids every form of state taxation in which federal obligations are "considered, directly or indirectly, in the computation of the tax." A tax computed based on a bank's assets which include federal obligations, minus its liabilities and only part of the federal obligations held as assets, violates Rev. Stat. § 3701 by considering federal obligations in the computation of the tax. Formulas similar to the one used by the court below are also being used in Pennsylvania, Louisiana, and Texas to avoid the exclusion of federal obligations. Regardless of the formula used to value shares, the entire face amount of a bank's federal obligations must be eliminated from the tax base.

ARGUMENT

Until 1959 Rev. Stat. § 3701 provided:

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

In 1959 Congress expanded the prohibition provided by Rev. Stat. § 3701 by adding the following sentence:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax. . . .

Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 622.

The 1959 amendment was intended by Congress "to sweep away formal distinctions and to invalidate all taxes measured directly or indirectly by the value of federal obligations, except those specified in the amendment." *American Bank & Trust Co. v. Dallas County*, 103 S.Ct. at 3377.

In *American Bank & Trust Co.*, the Court defined "considered" in the statute in its ordinary sense of "taken into account" or "included in the accounting". 103 S.Ct. at 3374. Because Rev. Stat. § 3701 forbids all state taxes which take into account, directly or indirectly, the value of federal obligations, states are required to exclude and eliminate the value of federal obligations in computing local taxes.

The tax calculated by the court below excludes only a portion (less than 10%) of the bank's federal obligations, and therefore, as to the remainder of the bank's obligations, violates the clear prohibition of Rev. Stat. § 3701. As an example, the Georgia Supreme court computed the tax as follows (Jurisdictional Statement Appendix p. A-7):

> [I]ts total assets of $20,463,522 for the year 1979 included $1,995,393 in federal securities. Thus its federal securities represented 9.75% of its assets. Hence, 9.75% of its net worth is represented by federal securities. The bank therefore is entitled to reduce its net worth ($2,082,488) by 9.75% ($203,043) so as to remove from the tax base so much of its net worth as is represented by federal securities.

The tax includes all of a bank's federal obligations in arriving at its net worth (assets less liabilities) and then reduces the bank's net worth by only a portion of its federal obligations. Such a tax plainly takes into account the remainder of the bank's federal obligations because they are "included in the accounting" of the bank's net worth that is used to value the shares and compute the tax. In assessing the tax on net-worth share-value in the instant case, the only manner in which the obligations may be eliminated from the tax base is to exclude them from gross assets before determining net worth.

The Georgia decision seductively draws the problem of avoiding consideration of federal obligations into an ac-

counting formula used to determine share value. We assume that under state law the formula is generally appropriate for valuing shares. But it does not follow that such a formula for valuing shares may also be used to determine whether the actual share value, on which the tax is computed, directly or indirectly considers any federal obligations. The use of such formulas obscures the principle plainly instinct in the Court's *American Bank & Trust* decision, that whatever method and whatever result is involved in valuation of shares, the full amount of the bank's federal obligations must be eliminated from the value base in order that they not be considered directly or indirectly in the computation of the tax.

Because the Georgia tax is computed without the elimination and exclusion of the bank's federal obligations, the tax violates Rev. Stat. § 3701.

The fundamental error of the Georgia approach is widespread. Following the Court's decision in *American Bank & Trust,* taxing authorities in Texas, Louisiana, and Pennsylvania have also taken the position that formulas may be used to exclude only a part of a bank's federal obligations without violating Rev. Stat. § 3701.

In Texas several formulas are being used to circumvent Rev. Stat. § 3701 and this Court's decision in *American Bank & Trust.* In Dallas County, for example, taxing authorities use a percentage formula for deduction of federal obligations that is based on the ratio of adjusted net worth to total assets. *See* Texas House of Representatives, House Study Group Report, *The Bank-Shares Tax* (Nov. 22, 1983), p. 8. This generally results in the exclu-

sion of even a smaller amount of the bank's federal obligations than in Georgia.[1]

Other taxing authorities in Texas use a flat percentage of each bank's federal obligations as the amount to be excluded, and the percentage varies among those taxing authorities. Still other taxing authorities deduct only a portion of each bank's federal obligations equal to some multiple of the earnings on the bank's federal obligations.[2]

Other states with share taxes are also attempting only a partial exclusion of federal obligations in computing their bank share taxes. Following the decision in *American Bank & Trust,* Pennsylvania amended its bank share tax statute

---

[1] The amount deducted is from 2% to 8%, based on a random sampling of 1983 assessments of Dallas County banks. Litigation is pending by more than 100 banks, including these amici curiae, as to whether this formula is permitted by Rev. Stat. § 3701. *Allied Bank of Dallas, et al. v. Appraisal Review Board of the Dallas County Appraisal District, et al.,* No. 83-15917, 162nd District Court, Dallas County, Texas.

[2] Data on formulas currently in use in Texas are based on a survey of 253 Texas taxing districts, reported by the Texas Research League in its Report to the [Texas Legislature] Joint Select Committee on Fiscal Policy, *Status of the Texas Bank Share Tax* (June 14, 1984). Of the 209 responding tax authorities, 152 had completed valuation of their respective bank's shares. Of these, 47 eliminated federal obligations from the computation of the tax. The remainder used various formulas to arrive at partial deductions of federal obligations, but the amount excluded varies depending on the formula used by the taxing authorities: 14 used a fixed percentage deduction of federal obligations, 26 used the Georgia formula deduction of federal obligations, and 36 deducted only an amount equal to some multiple of the bank's federal obligation income. In addition, 45 taxing authorities that had not completed their valuations at the time of the survey were in the process of using one of the above mentioned formulas. Of the remaining taxing authorities, 39 plan no action until clarification of the situation.

to provide that the shares be valued based on net worth minus only "an amount equal to the same percentage of such total [net worth] as the book value of obligations of the United States bears to the book value of the total assets." Laws of Pa., Act 1983-66.

A similar proportionate deduction is used in Louisiana where bank shares are valued based on 80% of the bank's book value and 20% of a multiple of the income of the bank. La. Rev. Stat. Ann. § 47:1967. We are advised that federal obligations are partially deducted using the Georgia method in the book value part of the computation; and in the income aspect, a partial deduction of the interest on federal obligations is based on a percentage obtained by dividing the income from federal obligations by total income. (Advice from Louisiana State Tax Commissioner's office, May 1, 1984).

These formulas may or may not be reasonable valuation formulas under state law; as valuation formulas they are not in issue here. The issue is whether — regardless of the method used to value a bank's shares — the *entire* value of a bank's federal obligations must necessarily be eliminated from the taxable value of the shares in order that the share value not take into account, even indirectly, the bank's federal obligations. Rev. Stat. § 3701 is not concerned with formulas. The federal concern requires the complete elimination of the value of federal obligations from the total value of the shares at some point before imposition of the tax because Rev. Stat. § 3701 forbids "all taxes measured directly or indirectly by the value of federal obligations." *American Bank & Trust Co. v. Dallas County*, 103 S.Ct. at 3377.

Rather than excluding the federal obligations, state taxing authorities use these formulas to *include* a large amount

of the face amount of those federal obligations. Whatever protection is afforded by Rev. Stat. § 3701 is rendered virtually meaningless by the use of these formulas. Their use should be eliminated by this Court's guidance.

CONCLUSION

The decision below violates the immunity from state taxation guaranteed by Congress in Rev. Stat. § 3701 and explained by the Court in *American Bank and Trust*. Widespread attempts to evade the plain language of Rev. Stat. § 3701 are so erroneous as to call for correction by this Court. For the foregoing reasons, and the reasons contained in Brief for Appellant and Brief for the United States as Amicus Curiae, the decision below should be reversed.

Respectfully submitted,

Marvin S. Sloman
Brian M. Lidji
Carrington, Coleman,
Sloman & Blumenthal
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201
(214) 698-8000

Peter S. Chantilis
Cecilia H. Morgan
Chantilis & Morgan
8150 North Central Expwy.
Dallas, Texas 75206
Roy C. Coffee, Jr.
Christopher G. Sharp
Coffee, Coffee, & Sharp
6201 Hillcrest
Dallas, Texas 75205
Bruce W. Bowman, Jr.
Vial, Hamilton, Koch,
Tubb & Knox
1500 RepublicBank Tower
Dallas, Texas 75201

July 13, 1984

AMICUS CURIAE

BRIEF

No. 83-1620

In The
Supreme Court of the United States
OCTOBER TERM, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

BRIEF OF THE COUNTY OF DALLAS, TEXAS, THE CITY OF RICHARDSON, THE CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT, THE GARLAND INDEPENDENT SCHOOL DISTRICT, THE RICHARDSON INDEPENDENT SCHOOL DISTRICT AND THE DALLAS COUNTY APPRAISAL DISTRICT AS AMICI CURIAE IN SUPPORT OF APPELLEES

TIM KIRK
Sanner, Jack, Sallinger and Nichols
1200 Republic Bank Building
Dallas, Texas 75201
(214) 742-5464
Counsel for City of Richardson and Dallas County Appraisal District

EARL LUNA*
RANDEL B. GIBBS
Law Offices of Earl Luna, P.C.
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582
*Counsel of Record
Counsel for The County of Dallas, Texas, the Carrollton-Farmers Branch Independent School District, the Garland Independent School District and the Richardson Independent School District

August 11, 1984

QUESTION PRESENTED

Whether Rev. Stat. § 3701 is violated by a state bank share tax which eliminates the federal obligations held by the bank from consideration in the calculation of the tax by excluding the obligations from the tax base?*

---

*The question has been reworded to reflect the question actually presented.

INTEREST OF AMICI CURIAE

The amici listed on the cover of this brief have an interest in the subject matter of the appeal because they are taxing authorities which are involved in litigation concerning a bank share tax which uses a method of calculation similar to that used by Georgia in this cause, and the outcome of this appeal may be determinative of the questions presented in the Texas litigation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF AMICI CURIAE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	13
PROOF OF SERVICE	14

TABLE OF AUTHORITIES

Page

Cases

American Bank and Trust Co. v. Dallas County, No. 82-1717, 103 S.Ct. 3369 (1983) on remand, No. 20915, Slip Opinion, July 23, 1984 ..... 2, 3, 10, 11

Bartow County Bank v. Bartow County Board of Tax Assessors, 312 S.E.2d 102 (1984) 7

Commonwealth v. Union Trust Co. of Pittsburgh, 27 A.2d 15 (Pa. 1942) 9

Statutes

Rev. Stat. § 3701 ..... passim

Tex.Ed.Code § 23.76 (Vernon Supp. 1984) 5

Texas Property Tax Code § 6.01 (Vernon 1982) 2

Other Authorities

Bank Costs for Planning and Control (Bank Administration Institute) 4

FDIC ANNUAL REPORT FOR 1981, Table 112 11

1982 Statistics on Banking from the FDIC 11

No. 83-1620

In The

Supreme Court of the United States

OCTOBER TERM, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

BRIEF OF THE COUNTY OF DALLAS, TEXAS, THE CITY OF RICHARDSON, THE CARROLLTON-FARMERS BRANCH INDEPENDENT SCHOOL DISTRICT, THE GARLAND INDEPENDENT SCHOOL DISTRICT, THE RICHARDSON INDEPENDENT SCHOOL DISTRICT AND THE DALLAS COUNTY APPRAISAL DISTRICT AS AMICI CURIAE IN SUPPORT OF APPELLEES

These taxing authorities,[1] some of which were respondents in *American Bank & Trust Co. v. Dallas County*, No. 82-1717, 103 S.Ct. 3369 (1983), respectfully urge the Court to affirm the decision of the Supreme Court of Georgia.

SUMMARY OF THE ARGUMENT

A tax on bank stock which excludes from the tax base an amount equal to the proportionate amount of such base which constitutes or represents federal obligations does not require such obligations to be considered, directly or indirectly, in the computation of the tax, and in fact excludes such obligations from consideration. To require the taxing authorities to deduct more than a proportionate amount would give the taxpayer an unwarranted windfall not required by Rev. Stat. § 3701. The tax imposed by the Georgia court is a tax on net worth or equity capital. It is not a tax on specific assets of the bank. It is recognized that a tax on net worth may not tax federal obligations to the extent they are present or represented in net worth. However, it is illogical and inaccurate to assume, as the banks have in their controversy, that in a typical bank equity capital or net worth is invested solely in U.S. obligations or that the sole source of federal obligations is bank equity capital. To the contrary, a more logical assumption would be that funds derived from the more volatile, withdrawal-vulnerable sources would be the dominant if not the only source of investments in federal obligations, which have a high degree of liquidity. The contentions of the Appellant are contrary to the established investment policies of the preponderance of banks throughout the country.

[1]The Dallas County Appraisal District was created by the Texas Legislature to handle appraisals for all taxing units in Dallas County, and began performing such duties in 1982. See the Texas Property Tax Code § 6.01 (Vernon 1982).

This court has held in *American Bank and Trust Co. v. Dallas County*, ... U.S. ..... 103 S.Ct. 3369 (1983) that federal obligations must somehow be excluded from a bank share tax. This has been accomplished by the methodology adopted by the Georgia court.

The banks also contend, without any supporting data, that a share tax such as the one employed by Georgia and the other states would have a "chilling" effect upon the sale of federal obligations. These suppositions are not true. Historical data reflect that the purchase of federal obligations by banks in the states having a share tax have been approximately twenty-five percent greater than in the states where such form of taxation does not exist.

ARGUMENT

The decision of this Court in *American Bank & Trust Co. v. Dallas County*, 103 S.Ct. 3369 (1983), which held that the method used in Texas to value bank stock for taxation purposes was in violation of Rev. Stat. § 3701, left the states which impose a property tax on bank stock in a quandary.[2] They still had the power to tax bank stock, but they now had to find another way of determining the value of the stock without considering the value of any federal obligations owned by the bank. The difficulty arose from the fact that neither *American Bank* nor any other decision set forth what methods would be acceptable.

Dallas County Appraisal District, one of the Amici herein, has adopted a formula of taxation for the years 1983 and

[2]On remand, the Dallas Court of Appeals has held that, under state law, the banks and their shareholders have not shown entitlement to the injunctive relief they sought, and thus are still subject to an assessment of the shares of stock. *American Bank and Trust Co. v. Dallas County*, No. 20915, Slip Opinion, July 23, 1984.

1984 based on the "pool of funds" concept which is similar in effect to that of the Appellee, State of Georgia. The methodologies are similar in that both tax equity capital or net worth after excluding federal obligations that might be contained therein.[3]

The Dallas formula was not arrived at hastily, but only after extensive consultation with experts thoroughly familiar with the accounting and investment techniques employed by banks in their day-to-day operations.

Most banks do not have a formal, documented investment strategy. Instead, they depend upon their management to utilize the sources and uses of funds available to them in their market area to attain their objectives. In essence, such banks consider themselves to have a "pool" of fund sources which are invested in a "pool" of fund uses at rates of return which will provide them a net interest "spread" sufficient to cover net non-interest expenses and generate net income to the bank.

The "pool of funds" concept of associating fund sources with fund uses has been accepted universally by banks for many years. For example, the Bank Administration Institute (BAI) publication *Bank Costs for Planning and Control*, specifically, Chapter 11, Allocating the Cost of Funds, illus-

[3]The object of the Dallas formula is to determine the maximum portion of equity capital which is invested in U.S. obligations which should not be assessed for tax purposes. This is accomplished by dividing Adjusted Equity Capital by the Adjusted Pool of Available Funds to determine the portion of the pool of available funds supplied by equity capital. The result then is applied to Adjusted U.S. Obligations to determine the amount of equity capital considered to be invested in such obligations, which amount in turn is subtracted from Adjusted Equity Capital to arrive at the amount of net shareholder equity to be assessed for ad valorem tax purposes. A calculation is also made to delete current net interest earned on the Federal obligations.

trates the pool of funds concept in allocating the cost of fund sources (demand deposits, public funds deposits, time deposits, borrowing, capital funds, etc.) to the fund-using functions (Federal securities, short-term money-market loans, commercial loans, consumer loans, real estate loans, etc.) In essence, this approach considers a pro-rata portion of each fund source to have been invested in each asset comprising the pool of funds used.

Specific allocations which are used by many banks in applying the techniques described in the BAI publication are to consider public funds to have been invested in investment securities (because public funds are required to be secured by investment securities[4]) and to consider equity capital to have been invested in bank premises, with any excess being considered a portion of the pool of fund sources.

The pool of funds concept is also used by the Federal Reserve Banks in their annual Functional Cost Analysis (FCA) program, which in 1981 had 614 participating banks in the Twelve Federal Reserve Districts.

As shown in the BAI publication, banks tend to balance their withdrawal-vulnerable funds, such as federal reserve funds purchased and demand deposits, with investments in the most liquid assets such as federal obligations.

The suggestions put forth by the banks for taxing stock, and put forth in this cause by the Appellants and their amici, were uniform, self-serving and unacceptable. Their idea was and is that the taxing authorities could use whatever method they chose to get stock values, but then from such values would be deducted the total amount of federal obligations owned by the bank. As we pointed out to this Honorable Court in *American Bank & Trust* (Brief For Respondents

[4]See, for instance, Tex. Ed. Code § 23.76 (Vernon Supp. 1984)

Dallas County, et al, January 14, 1983, p. 16), this would have resulted in most of the banks in this case paying no tax at all. The effect of this, of course, would be that all assets owned by such banks would escape taxation, and the taxation burden formerly carried by banks would be shifted to other property owners such as homeowners.

Rejecting this approach, the Georgia Supreme Court and various taxing authorities (including some in Texas) have embraced methods of valuation which attempt to fairly exclude from the calculation of the tax all federal obligations owned by the banks. These amici believe that the assessment method under attack here *does* exclude all such obligations, and that the arguments put forth by appellants and their amici are illogical and not supported by the facts.

In spite of the investment policy devised and implemented by the banks themselves as shown by the BAI publication, the Appellant and supporting Amici urge a theory that has the effect of asserting that all federal obligations are purchased from equity capital. They make this argument in spite of the fact that prudent banking practices in this country indicate that most if not all of the money invested in federal obligations has as its source such volatile funds such as demand deposits.

Equity capital obviously is the least volatile of any asset of any bank. In its intangible form it represents the accumulation of earnings of the bank, and the initial investment. The money is not owed to depositors and therefore does not have an offsetting liability on the balance sheet of the bank. This money has traditionally been invested in real estate, furniture, fixtures and other tangible personal property with the remainder being invested in high yield, greater risk assets. Prudent money management as well as common

sense dictates that such funds would not be invested in federal obligations but rather in longer term less liquid assets such as long term real estate loans returning a significantly higher rate of interest.

The Georgia Supreme Court sets forth a straight-forward proposition: If 10% of a bank's assets are federal obligations which may not be taxed or considered in taxation, then from whatever figure is finally derived after all calculations are made to determine value, 10% should be deducted to exclude such obligations from the calculation of the tax. (See *Bartow County Bank v. Bartow County Board of Tax Assessors*, 312 S.E.2d 102 (1984). Contrary to the assertions of appellants and their amici, this method excludes every penny of federal obligations. Furthermore, this method cannot logically be said to serve in any way as a disincentive to the purchase of federal obligations.

Rather, since the allowable deduction *increases* as the amount of federal obligations increases, this tax serves as an incentive for purchasing such obligations and thus increases their marketability.

The banks' contentions are not only contrary to their own investment policies, but they also defy basic accounting principles. The appellant contends that the federal obligations should either be subtracted directly from total assets or deleted in their entirety from equity capital.

The most fundamental of accounting procedures requires that an adjustment to the assets requires a corresponding adjustment to the liabilities. Thus, subtracting Federal obligations from total assets would require reducing total liabilities by a like amount, resulting in no adjustment to equity capital.

The appellants contend that the entire dollar amount of federal obligations must be deducted from the final taxable value of the stock in order to eliminate the obligations from consideration. This would be true only if the tax was on the assets themselves, which is not the case. Where, however, the tax is based on the per-share value of equity capital, such a deduction would in fact be a deduction in *excess* of the amount of federal obligations, since equity capital necessarily excludes a large portion of bank assets — those assets obtained with deposits or other liabilities. For instance, see J.A. A-7 through A-12. The total assets of the First National Bank of Cartersville were $51,407,000. However, the total equity value on which a tax was imposed was only $5,782,000. Thus, a tax is imposed only on 11.25% of the total assets in the first place. That is, 88.75% of the assets (including federal obligations) are already deducted before the equity capital figure is reached. Since the federal obligations constitute (in this case) 16.64% of the *total* assets, it is both fair and logical to deduct from the equity capital figure 16.64% of such figure to take out the portion of such figure which can reasonably be attributed to federal obligations, while leaving other assets subject to taxation.

Also a direct deduction of federal obligations from net worth is equally illogical. If such was the case then each time federal obligations increased or decreased there would be a like increase or decrease in equity capital. This would mean that if a bank's federal obligations exceeded its net worth and the bank subsequently disposed of its federal obligations that it would become insolvent or have a negative net worth. This illustration merely highlights the absurdity of the banks' contention that there is a direct correlation between federal obligations and equity capital.

As can be seen, it is simply not true that (as claimed by the *American Bank & Trust* petitioners in their brief as amici curiae, p. 3) "The tax includes all of a bank's federal obligations in arriving at its net worth . . . ." Were this true, it would not be possible for the amount of obligations to be greater than the amount of equity capital, as is the case of the First National Bank of Cartersville. Likewise in error is the statement in the brief filed by the United States that "in the computations of the amount of the Bank's net worth here, all of the obligations of the United States owned by the Bank were included" (brief p. 10-11). Since federal obligations constitute only 16.64% of the total assets, they must, as a matter of common sense, constitute no more than 16.64% of the equity capital.

The appellants appear to misunderstand some of the basic principles of bookkeeping underlying this tax and this method of calculating the taxable value. These principles have been set forth very well in *Commonwealth v. Union Trust Co. of Pittsburgh*, 27 A.2d 15 (Pa. 1942). The Court explains there that a tax based upon equity capital excludes from its base all assets which are purchased with deposits (or other liabilities).

> "When there is deducted from the gross assets the amount owed to depositors, and the net assets are thereby ascertained it is only the latter, not the investments of deposited moneys, which constitute the tax base. It must therefore be determined how much of the exempt securities remain in the net assets after the deposits (and therefore all investments of the deposits) have been deducted from the total assets ... [The apportionment formula] makes it reasonably certain that no exempt securities are included in the tax base ... (27 A.2d at 18).

The United States misses this point in its brief. In note 5 (p. 12), the Solicitor-General characterizes the

Georgia court's decision as acknowledging "that banks that could show that federal obligations were purchased from capital stock or surplus might be entitled to a complete deduction," and claiming that a tax exemption "should not vary depending on the label of the fund out of which they were purchased." This kind of statement demonstrates that the Solicitor-General fails to see that, as to federal obligations purchased with deposits and other liabilities, such obligations are *never* included in the tax base where equity capital is used, since such amounts have *already been deducted* in determining equity capital. To deduct that portion of such obligations *again* would be a double deduction. It is only that portion of the federal obligations which were purchased with equity capital funds which remain in the tax base and, if they could be segregated, could be deducted. Since, as a practical matter, it is not possible to segregate such purchases, an apportionment formula must be used to eliminate consideration of federal obligations.

Throughout the briefs of the Appellant and amici in support, they have construed the opinion of the Supreme Court in *American Bank* as requiring that federal obligations be fully excluded from total assets and thus from net worth. This is a quantum jump from what the Court actually held.

The Court held that Congress meant to bar share taxes *to the extent* they consider federal obligations in the computation of the tax. 103 S. Ct. at 3375. The Court defined "considered" to mean taken into account, or *included* in the accounting.

The entire purpose of the formula in question herein is to exclude, not include, federal obligations in arriving at

taxable value. To this extent we agree entirely with the interpretation of the Court's mandate as contained on page 8 of the Brief of the Appellant — "states are required to exclude or eliminate federal obligations when computing a state tax."

The United States states as fact that "the decision below decreases the marketability of federal obligation." (Brief, p. 15 n. 6) The United States made a similar statement in *American Bank & Trust.* (Brief For the United States As Amicus Curiae, September, 1982, p.7) This statement is not supported by the record in this case, nor was it supported by any evidence in *American Bank & Trust.* Rather it is mere supposition. There is simply no proof in this case or *American Bank & Trust* that, if this decision were reversed, more federal obligations would be sold or that such obligations would be sold at an interest rate more favorable to the United States.

Conversely, data available from the FDIC for the year 1982 shows that in the seven states where bank share taxes were in effect that the banks from their total assets invested 12.1 percent in federal obligations. In the remainder of the states (43) the banks invested 9.9 percent of their total assets in federal obligations.[5] For 1981 an average of all commercial banks in the United States reveals that 10.1 percent of their total assets was comprised of federal obligation while equity capital constituted only 7 percent of the total assets.[6]

The obvious conclusions from this are that since U.S. obligations exceeded equity that they must have been pur-

---

[5]1982 Statistics on Banking from the FDIC; State data from Consolidated Report of Condition of Commercial Banks computed by Sheshunoff 1982.

[6]FDIC ANNUAL REPORT FOR 1981, Table 112.

chased from non-equity sources; and that a bank stock tax does not inhibit or hinder the marketability of United States obligations. State taxation of bank stock is simply not a factor in the decisions of banks determining the amount of federal obligations they purchase, and the arguments of Appellant and its Amici to the contrary are not supported by any data or evidence.

CONCLUSION

The method devised by the Georgia Supreme Court for excluding federal obligations from the calculation of the bank shares tax is logical and as accurate as reasonably possible and does not violate Rev. Stat. §3701. The decision of the Georgia Supreme Court should be affirmed.

Respectfully submitted,

TIM KIRK
Saner, Jack, Sallinger and Nichols
1200 Republic Bank Building
Dallas, Texas 75201
(214) 742-5464

Counsel for City of Richardson and Dallas County Appraisal District

EARL LUNA,
Counsel of Record,
RANDEL B. GIBBS
Law Offices of Earl Luna, P.C.
2416 LTV Tower
1525 Elm Street
Dallas, Texas 75201
(214) 747-1582

Counsel for The County of Dallas, Texas, the Carrollton-Farmers Branch Independent School District, the Garland Independent School District and the Richardson Independent School District

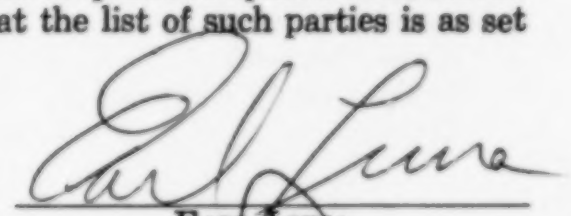
August 11, 1984

PROOF OF SERVICE

I, Earl Luna, counsel of record for the amici listed below, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 9 day of August, 1984, I served three copies of this brief amici curiae on each of the several parties hereto, by mailing in duly addressed envelopes with first-class postage prepaid, to each of the following:

1. The First National Bank of Atlanta as successor in interest to First National Bank of Cartersville, Georgia, by and through its counsel of record, L. Trammell Newton, Jr., Hansell & Post, 3300 First Atlanta Tower, Atlanta, Georgia 30383-3101.
2. The Bartow County Board of Tax Assessors and Marcus Collins as successor in interest to W. G. Strickland, State Revenue Commissioner, through their counsel of record, James C. Pratt, Assistant Attorney General, 132 State Judicial Building, Atlanta, Georgia 30339.

It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.



EARL LUNA

Counsel of Record for County of Dallas, Texas, the City of Richardson, the Carrollton-Farmers Branch Independent School District, the Garland Independent School District, the Richardson Independent School District and the Dallas County Appraisal District.

AMICUS CURIAE

BRIEF

No. 83-1620

In The

Supreme Court of the United States

OCTOBER TERM, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
AND MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

BRIEF OF AMICUS CURIAE VIRGINIA BANKERS ASSOCIATION

JOHN W. EDMONDS, III
Counsel of Record
FRED W. PALMORE, III
MAYS, VALENTINE, DAVENPORT
AND MOORE
1122 Sovran Center
Richmond, Virginia 23219
804/644-6011

August 10, 1984

TABLE OF CONTENTS

	Page
Table of Authorities	i
Interest of the Amicus	1
Statement of the Case	2
Summary of Argument	5
Argument	6
A. A State Statute Which Causes Exclusion From a Tax Base of All or a Proper Proportion of Federal Obligations Has Not "Considered" Federal Obligations in Improperly Under Rev. Stat. § 3701	6
B. The Legislative History of Rev. Stat. § 3701 Does Not Indicate That Congress Intended a Complete Deduction of Federal Obligations From the Capital Component of the Right-Hand Side of the Balance Sheet	8
C. The Approach of the Georgia Supreme Court and of the Virginia Statutes Providing for a Pro Rata Exclusion of Federal Obligations From the Capital Account Properly Reflects the Intent and Conclusion of Congress That Neither Federal Obligations Nor Income Therefrom be Taxed by the State	11
Conclusion	13

TABLE OF AUTHORITIES

Cases

American Bank & Trust Co. v. *Dallas County*, 103 S.Ct. 3369 (1983) 2, 7, 11, 12

First Agr. Nat'l Bank of Berkshire County v. *State Tax Commission*, 392 U.S. 339 (1968) 5

Page

First Security Bank of Boseman v. *Montana Dept. of Revenue*, 177 Mont. 119, 580 P.2d 913 (1978) 2

Memphis Bank & Trust Co. v. *Garver*, 103 S.Ct. 692 (1983) ...5, 7

Montana Bankers Ass'n v. *Montana Dept. of Revenue*, 177 Mont. 112, 580 P.2d 909 (1978) 2

National Life Ins. Co. v. *United States*, 277 U.S. 508 (1928) ... 10

United States v. *Atlas Life Insurance Co.*, 381 U.S. 233 (1965) . 9

Statutes

Act of June 3, 1864, Ch. 106, § 41, 13 Stat. 12 9

Pub. L. 87-722, §1, Sept. 28, 1962, 76 Stat. 668, as amended by Pub. L. 96-221, Title VII, Section 704, Mar. 31, 1980, 94 Stat. 187, codified at 12 U.S.C. § 92a(f) 8

Rev. Stat. § 3701 ..... passim

Rev. Stat. § 5129 ..... 4, 5, 11

Rev. Stat. § 5153 8

Va. Code § 6.1-21 (1983 Repl. Vol.) 8

Va. Code § 6.1-78 (1983 Repl. Vol.) 8

Va. Code § 6.1-79 (1983 Repl. Vol.) 8

Va. Code § 58.476-476.5 (1974 Repl. Vol.) 3

Va. Code § 58-485.07 (1984 Interim Supp.) 2, 3, 4

Va. Code § 58-485.08 (1984 Interim Supp.) 2, 3, 4

Va. Code § 58.1-1205 (effective 1/1/85) 2

Va. Code § 58.1-1206 (effective 1/1/85) 2

Other Authorities

S. Rep. No. 909, 8*th Cong., 1st Sess. 2 *reprinted* in [1959], U.S. Code Cong. & Ad. News, 2769, 2773, 2777 9

In The

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1620

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
AND MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The Supreme Court of Georgia

BRIEF OF AMICUS CURIAE VIRGINIA BANKERS ASSOCIATION

INTEREST OF THE AMICUS

Consents of the appellant and appellees to the filing of this brief accompany the filing of this brief, as permitted by Rule 36.2. The amicus brief is filed in support of the appellees.

The amicus curiae, the Virginia Bankers Association, is the trade association consisting of all the commercial banks in Virginia. The reason for its brief is to support a proper

allocation of U. S. obligations to capital and to liabilities of a bank.

Sections 58-485.07 and 58-485.08 of the Virginia Code exclude, for purposes of computation of the Virginia franchise tax, from net capital obligations of the United States in an amount equal to the same percentage of the gross capital accounts of the bank as such obligations of the United States bear to the total assets of the bank based upon the four most recent Reports of Condition. These sections were recodified during the 1984 General Assembly to be effective on January 1, 1985, and the sections will be renumbered as §§ 58.1-1205 and 58.1-1206.

STATEMENT OF THE CASE

It is desirable to state the involvement and perspective of the Virginia Bankers Association on this case.

In 1979, the decisions in the cases of *Montana Bankers Ass'n* v. *Montana Department of Revenue*, 177 Mont. 112, 580 P.2d 909 (1978), and *First Security Bank of Boseman* v. *Montana Department of Revenue*, 177 Mont. 119, 580 P.2d 913 (1978), became the focal point of the attention of many Virginia banks and bank holding companies. The filing of one protective refund suit prior to the end of the calendar year 1979 and the concurrent running of the applicable statute of limitations had a domino effect, causing the larger bank holding companies to file similar refund suits. The eventual decision of this Court in *American Bank & Trust Co.* v. *Dallas County*, 103 S. Ct. 3369 (1983), indicated these concerns had a sound basis.

In 1979, Virginia had a bank share tax, as did Montana, Texas, Georgia and many other states. The Virginia share tax was essentially a tax on the "net equity capital" reduced by the value of real estate owned by a bank. Under

§§ 58-476 through 58-476.5 of the Code of Virginia, 80% of the proceeds of this tax went to the counties, cities and towns. The possible illegality of those statutes, with resulting noncollectibility and refund liability of these localities created concern in the Virginia legislature.

The Virginia Bankers Association took a lead in forging a new tax structure for banks, trying to leave the incidence of the revenues and the impact of the tax in place, while addressing the concern of the Montana Court and Rev. Stat. § 3701 that federal obligations not be taxed.

Virginia availed itself of the opportunity to characterize the tax as a "franchise tax", thereby differentiating it from the Georgia and Texas taxes. The computation of the tax, however, is not dissimilar.

The resulting Virginia statutes, §§ 58-485.07 and 58-485.08 (the "Virginia Statutes"), set forth below, proceed upon one simple theory, that the right hand side of the balance sheet comprises both (1) liabilities, including deposits and otherwise, and (2) capital. Federal obligations, being among the assets on the left hand side of the balance sheet, need not be attributed exclusively to either liabilities or capital.

> **§ 58-485.07. Computation of net capital.**—The net capital of any bank shall be ascertained by adding together its capital, surplus and undivided profits to obtain gross capital and deducting therefrom (i) the assessed value of real estate as provided in § 58-485.08, (ii) the book value of tangible personal property under § 58-485.08, (iii) the pro rata share of government obligations as set forth in § 58-485.08, (iv) the capital accounts of any bank subsidiaries under § 58-485.08, and (v) (a) the amount of any reserve for loan losses which is allowable by the Internal Revenue Service.

§ 58-485.08. Deductions from gross capital. — There shall be deducted from the gross capital otherwise ascertainable under § 58-485.07:

1. The assessed value of real estate if otherwise taxed in this Commonwealth.

2. The book value of tangible personal property which shall be held for lease and is otherwise taxed.

3. An amount which shall equal *the same percentage of the gross capital account, defined as its capital, surplus and undivided profits as set forth in § 58-485.07 at December thirty-one next preceding as the obligations of the United States bear to the total assets of the bank. Such percentage of U.S. obligations shall be determined as of the four most recent (or less in case of a new bank) Reports of Condition and the percentage obtained shall be averaged.* The obligations of the United States exempt from taxation under 31 U.S.C. § 742, of the United States Constitution or any other statute, or any instrumentality or agency of the United States which obligations shall be exempt from State or local taxation under the United States Constitution or any statute of the United States.

4. The amount of retained earnings and surplus of subsidiaries to the extent included in the gross capital of the bank. (Italics supplied)

The guiding star for the taxation of banks had been Rev. Stat. § 5129, and for a very simple reason. This statute was the only way a state could tax a national bank, and states were unlikely to put a different or heavier burden on state banks, which were entities of their own creation.

The Virginia Statutes seem to meet the first test of a franchise tax as defined in Rev. Stat. § 3701, in that it is nondiscriminatory. They do not permit the deduction, even on a pro rata basis, of obligations of Virginia and its political subdivisions. *Memphis Bank & Trust Co.* v. *Garver,* 103 S.Ct. 692 (1983). Perhaps this case can be resolved by the use or non-use of the label "franchise tax". Had we thought it this simple, we probably would not have filed this amicus brief.

One of the difficulties in the taxation of banks, state or national, is that as an industry group, their holdings of federal obligations represent a greater percentage of their assets and a greater percentage of their gross income than those of any other industry group.

A complete exclusion of federal obligations would have resulted in the bank paying little or no tax, a result which initially might be appealing to banks, but one which would probably be short lived. Cf. *First Agr. Nat'l Bank of Berkshire County & State Tax Commission,* 392 U.S. 339 (1968) (holding the Massachusetts sales tax illegal as applied to national banks; this holding was overruled effectively in 1969 by amendment to Rev. Stat. § 5129).

It may seem to be a strange turn of events for a bankers' association to say: "Let us be taxed." Maybe this position is in part good citizenship. A recognition of the difficulties of taxation of banks at the state level, a due concern for the immunity granted federal obligations and the desire of the Virginia legislature to achieve fair results within this limited framework led us to file this brief.

SUMMARY OF ARGUMENT

1. Rev. Stat § 3701 forbids "every form of [state] taxation that would require that . . . [federal] obligations . . . be considered, directly or indirectly, in the computation of the tax . . ." A proportionate and non-discriminatory deduction for federal obligations may "consider" these obligations by taking them into account in the computation of the bank

share tax, without violating the statute. A complete exclusion of federal obligations would "consider" the obligations in the strictest sense of the word. A statutory allocation which causes a deduction from banks' capital accounts of capital allocable to federal obligations is not constitutionally infirm.

2. Nothing in the legislative history of Rev. Stat. § 3701 or its amendments prohibits a proportionate exclusion of federal obligations.

3. A pro rata exclusion of federal obligations from the mass of assets which are taxed only in part, such as a tax on net capital, conforms to the Congressional intent that federal obligations not be taxed. The exemption for federal obligations is not intended to shelter otherwise taxable assets.

ARGUMENT

A.

A State Statute Which Causes Exclusion From A Tax Base Of All Or A Proper Proportion Of Federal Obligations Has Not "Considered" Federal Obilgations Improperly Under Rev. Stat. § 3701.

If read literally, Rev. Stat. § 3701 would not permit a state statute which completely excluded federal obligations from the computation of property or income taxes. For example, when income from federal obligations is exempt for state income tax purposes (or deducted from gross income), such obligations, in the broadest sense have been "considered. . . in the computation of the tax. . ."

The argument of appellant is that any state statute which imposes a tax on or measured by capital or net worth must reduce capital (and surplus) or net worth by the full amount of federal obligations, or such statute has incorrectly "considered" federal obligations in calculating the tax. We disagree.

American Bank & Trust Co. v. *Dallas County*, 103 S.Ct. 3369 (1983), is not apposite. The Texas statute at issue in that case made no allocation as did the Georgia court and does the Virginia statute.

The opinion of this Court in that decision states the question in the opening sentence:

> "The question presented is whether a Texas property tax on bank shares computed on the basis of the bank's net worth *without any deduction* for tax exempt obligations held by the bank, violates Rev. Stat. § 3701 as amended." *(Italics supplied)*

Nor is the question of allocation addressed by the earlier case of *Memphis Bank & Trust Co.* v. *Garver*, 103 S.Ct. 692 (1983). Referring to the protection of Rev. Stat. § 3701 as a "broad exemption", this Court limited the scope of its opinion to holding that the Tennessee franchise tax failed to meet the statutory criterion of being "non-discriminatory", because it exempted interest earned on Tennessee obligations, but not interest on federal obligations.

The word "considered" in Rev. Stat. § 3701 does not prohibit a full exclusion of federal obligations, nor does it compel a full exclusion of federal obligations from capital, surplus and undivided profits. It does not invalidate an exclusion which fairly recognizes that assets on the left-hand side of the balance sheet are not exclusively capital, but are both liabilities and capital.

B.

The Legislative History Of Rev. Stat. § 3701 Does Not Indicate That Congress Intended A Complete Deduction Of Federal Obligations From The Capital Component Of The Right-Hand Side Of The Balance Sheet.

Appellant would read Rev. Stat. § 3701 to require that if there is a tax on capital or net worth, the full amount of any federal obligations must always be subtracted from such net worth or capital account in computing any tax.

That interpretation will result in banks owing little or no tax because of the significant amount of federal obligations which they hold.

In fact the brief of the appellant shows that with a total capital of $5,781,612, the bank held federal obligations of $4,171,240—equaling roughly 72% of its capital.

Federal obligations serve at least two other purposes in addition to being an income source. (i) They are a primary source of liquidity which can be sold promptly in the event of either increased loan demand or a drop in deposits. (ii) They are also favored securities to be used for the purpose of securing governmental and trust deposits. See, for example, Rev. Stat. § 5153, permitting national banks to be depositaries of public money of the United States, provided that such banks give satisfactory security, "by the deposit of United States bonds and otherwise," for the safety of such public money. This same section authorizes national banks to give security for the safety of money of a state or any political subdivision. See also, Pub. L. 87-722 § 1, Sept. 28, 1962, 76 Stat. 668, as amended by Pub. L. 96-221, Title VII, § 704, Mar. 31, 1980, 94 Stat. 187, codified at 12 U.S.C. § 92a(f), permitting the deposits of securities for the protection of trust funds. Virginia has similar statutes prohibiting giving protection to any depositor or creditor with the exception of governmental deposits and trusts funds.

See Code of Virginia, §§ 6.1-78, 6.1-79 and 6.1-21. The latter section requires funds received or held in a trust department with a bank if deposited with the commercial department of that bank be secured in excess of FDIC insurance.

The initial method of taxing a national bank was a share tax, which in effect was a tax measured by the capital account of the bank. The tax was assessed against the shareholder and collected by the bank. Act of June 3, 1864, Ch. 106, § 41, 13 Stat. 112. To adopt the appellant's argument would be to say that in 1864, Congress consented to the taxation of the capital of a national bank or a tax measured by the capital of national banks, while at the same time regarding state banks as immune from the impact of the same tax.

The most recent legislative history on Rev. Stat. § 3701, in 1959, does not suggest that the taxation or non-taxation of banks was considered in revising that section. *See,* S. Rep. No. 909, 86th Cong., 1st Sess. 2 *reprinted* in [1959] U. S. Code Cong. & Ad. News 2769 at 2773 and 2777. The 1959 amendment was intended to refute "the position that the statute as now worded does not prohibit a state from including interest on federal obligations in computing 'gross income' ".

The most recent case directly addressing the allocation of non-taxable income, specifically non-taxable municipal bonds, is *United States* v. *Atlas Life Insurance Co.*, 381 U.S. 233 (1965). The case dealt with a section of the Internal Revenue Code affecting life insurance companies, under which policyholder reserves were not taxed. The Court held that no impermissible tax on the interest earned by the insurance company from non-taxable municipal bonds resulted from the formula prescribed by the Internal Revenue Code,

which divided investment income into the policyholders' share and the company's share. The Court in *Atlas* specifically reconsidered its prior decision of *National Life Ins. Co.* v. *United States*, 277 U.S. 508 (1928), and rejected its rationale, which would have forbidden proration in the *Atlas* case.

To paraphrase the Court in *Atlas*, we maintain that a state may treat non-taxable assets in the manner they are treated by the Virginia Statutes and that the allocation of federal obligations completely to the capital account, rather than to the liabilities account, is not required constitutionally or statutorily. To the extent that the bank uses such obligations to secure deposits as required by law or to act as a source of liquidity for withdrawal of deposit funds or additional loan demand they are more like liabilities than capital from a functional standpoint. The Virginia Statutes, and the opinion of the Georgia Supreme Court, nevertheless make the allocation on a completely neutral basis. Neither attempts to say that federal obligations shall be attributed to liabilities, and not to capital, and therefore shall not be taxed, which would be merely a cosmetic compliance with Rev. Stat. § 3701. The allocation formula was designed to subject non-exempt assets to payment of a fair share of the burden imposed upon capital. The doctrine of governmental immunity from taxation does not require that the benefit of a complete exclusion from a capital account be conferred upon the ownership of federal obligations. The doctrine exempts the obligations, not the taxpayer, from taxation. A taxpayer who owns federal obligations does not get a wild card for exemption from property tax of an amount equal to the amount of the federal obligations.

C.

The Approach Of The Georgia Supreme Court And Of The Virginia Statutes Providing For A Pro Rata Exclusion Of Federal Obligations From The Capital Account Properly Reflects The Intent And Conclusion Of Congress That Neither Federal Obligations Nor Income Therefrom Be Taxed By The State.

The initial question in response to appellant's brief is whether *American Bank & Trust Co.* required exemption or exclusion from the capital account of a bank of the total amount of any federal obligations held by the bank. As noted earlier on page 7 of this brief, the Court characterized the question whether assertion of such tax "without any deduction for taxes on United States obligations" violated Rev. Stat. § 3701.

The Court held that the use of an "equity capital formula", which subtracts from the bank's capital assets, the bank's liabilities and the assessed value of the bank's real estate, took into account "at least indirectly" federal obligations that constitute in part the bank's assets.

The opinion in *American Bank & Trust Co.* in no way addressed the question of whether Rev. Stat. § 3701 required the exclusion of all federal obligations in the computation of capital upon which the share tax was measured or only required something less which nevertheless would comply with the Congressional mandate in Rev. Stat. § 3701.

Under the share tax approach in Georgia or the franchise tax approach enacted by Virginia, not all the assets are taxed. Under both statutes, the net capital account is adjusted by the exclusion of a pro rata share of federal obligations and exclusion of real estate which is otherwise taxed.

The permission to tax real estate of national banks (and its concomitant exclusion from the share tax or franchise tax) goes back to the predecessor of Rev. Stat. § 5219.

One can initially quarrel with the fact that real estate is taxed separately and the value thereof deducted from the capital account. This has as its obvious purpose the desire not to impose any double tax on real estate in its capacity as real estate and again on its capacity as a portion of the net capital and surplus of the bank.

Interestingly, the opinion in *American Bank & Trust Co.* does not discuss at length the reason for the exemption of federal obligations. The most often given and obvious reason for the exemption is to enhance and promote marketability of such obligations and to hold down their total cost to the federal government by guaranteeing that they should not be subjected to an intolerable tax burden.

Nevertheless, this guarantee not to be subjected to a state tax burden does not entitle the holder to relief from taxation of other assets or income because the taxpayer in fact holds federal obligations.

At one point, the *American Bank & Trust Co.* opinion poses the question whether the tax imposes an intolerable burden on federal obligations by threatening to diminish their values. The approach of the Georgia Court and the Virginia Statutes is to state that any U. S. obligations fairly attributable to the capital account, whether for share tax or franchise tax purposes, should be deducted from the capital basis for purposes of computation. Rev. Stat. § 3701 does prohibit the diminution of value by prohibiting its inclusion in the capital basis and requiring exclusion; it does not require any further enhancement of value by requiring the reduction of the net capital base by an amount greater than the pro rata allocation to the capital base of the federal obligations held.

Rev. Stat. § 3701 only commands that federal obligations not be taxed, either directly or indirectly. It does not

require their complete exclusion from a net tax on capital so that they would shelter taxable assets from tax. The Virginia statutes expressly recognize their exclusion and give explicit and fair treatment thereto. Rev. Stat. § 3701 commands nothing more.

CONCLUSION

For these reasons, the Court should affirm the decision of the Supreme Court of Georgia.

Respectfully submitted,

JOHN W. EDMONDS, III
Counsel of Record
FRED W. PALMORE, III

MAYS, VALENTINE, DAVENPORT & MOORE
1111 East Main Street
Sovran Center - 22nd Floor
P. O. Box 1122
Richmond, Virginia 23208
(804) 644-6011

AMICUS CURIAE

BRIEF

No. 83-1620

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees

On Appeal From The Supreme Court of Georgia

BRIEF OF PENNSYLVANIA BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

John J. Brennan
(Counsel of Record)
P. J. DiQuinzio
Dechert Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 972-3552

August 13, 1984

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

TABLE OF CONTENTS

	Page
Table of Authorities	i
Interest of Amicus Curiae	1
Summary of Argument	5
Argument	7
Conclusion	18

TABLE OF AUTHORITIES

Cases:

American Bank & Trust Co. v. Dallas County, 77 L.Ed.2d 1072 (1983) 2, 7, 12, 14, 15, 17

The Dale National Bank v. Commonwealth, 502 Pa. 170, 465 A.2d 965 (Pa. 1983) 2, 3

Dept. of Rev. v. 1st Fed. S&L. Assn. of Missoula, 654 P.2d 496 (Mont. 1982), cert. den. 77 L.Ed.2d 1378 (1983) 4

United States v. Atlas Life Insurance Co., 381 U.S. 233 (1965) 12, 13, 14

STATUTES—Federal:

Internal Revenue Code, §582 16

P.L. 86-89 14

Rev. Stat. §3701 ..... passim

12 U.S.C. §1433 7

12 U.S.C. §2055 7

31 U.S.C. §742 7

31 U.S.C. §3124(a) 7

TABLE OF AUTHORITIES—(*Continued*)

STATUTES—State:	Page
CCH State Tax Reports	
Florida	15
Massachusetts	15
New York	15
Virginia	2
Pa. Stat. Ann. Tit. 72 (Purdon)	
§503(4)	3
§1911	2
§1962	2
§7701	4
Texas, H.B. 122, 2nd Spec. Sess. (7/13/84)	17
REGULATIONS:	
12 C.F.R. 225	9
31 C.F.R. 203.15	16
MISCELLANEOUS:	
Board of Governors of the Federal Reserve System, State and Local Taxation of Banks, 92nd CONG., 2d SESS. 11 (Comm. Print, Comm. on Banking, U.S. Senate 1972)	10, 11, 13, 15
Comm. of Penna. Legislative Journal	2, 3
Federal Deposit Insurance Corp. Reports of Assets and Liabilities of Insured Commercial Banks	
United States	9
Pennsylvania	10
70 Federal Reserve Bull. (June, 1984)	9, 15
Hearings on Public Debt Ceiling and Interest Rate Ceiling on Bonds Before the House Committee on Ways and Means, 86th CONG., 1st Sess. (1980)	12
14 Pa. Bull. 704	3
Polk's World Bank Directory (R.L. Polk & Co., Spring, 1984)	10
Phila. Inquirer	3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees

On Appeal From The Supreme Court of Georgia

BRIEF OF PENNSYLVANIA BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

The Pennsylvania Bankers Association ("P.B.A.") is a commercial bank trade association whose members include 318 of the 325 incorporated commercial banks located in Pennsylvania. Apart from the interest which all taxpayers have in the method by which they are taxed,

members of P.B.A. have a particular interest in the continuity of the Pennsylvania bank shares tax whose validity could be drawn into question if the contention of appellant in this case should be adopted by the Court. The recent history of developments concerning bank taxation in Pennsylvania explains this interest.

Pennsylvania has traditionally used the bank shares tax and local real estate taxes as the exclusive methods of taxation of banks.[1] Its shares tax has been imposed solely for state revenue purposes unlike the shares taxes of other states which are for the benefit of local political subdivisions in whole or large part.[2] The Pennsylvania bank shares tax in effect until 1983, which imposed the tax on the value of shares without regard to the bank's ownership of U.S. securities, was held invalid in *The Dale National Bank v. Commonwealth*, 502 Pa. 170, 465 A.2d 965 (Pa. 1983) on the authority of *American Bank & Trust Co. v. Dallas County*, 77 L.Ed.2d 1072 (1983) (hereinafter cited as the *American Bank* case).

The immediate effect of the *Dale* decision was to threaten what was described as "a very serious fiscal crisis" for the State Government caused by "a cash-flow problem unparalleled in Pennsylvania history".[3] The State faced a delay in regular payment of subsidies to school districts and delay of other payments because borrowing through tax anticipation notes was hindered by an estimated revenue loss of $450-$500 million by reason of the invalidity of the bank shares tax and the

1. See Pa. Stat. Ann. Tit. 72, §1911 and historical note; §1962 (Purdon).

2. The former Georgia tax involved in this case was for local purposes. See App. to Jurisdiction Statement at A-26 to A-29. The current Virginia tax is divided 20% for state purposes and 80% for local purposes. See 2 CCH State Tax Reporter (Virginia) ¶95-259 to ¶95-261; ¶95-265.

3. 86 Comm. of Penna. Legislative Journal 1406 (Senate, Nov. 30, 1983); 91 *id.* 1842 (House of Representatives, Nov. 16, 1983).

refund claims which banks would have for periods covering 5 years or more.[4] This estimate proved to be accurate since the total refunds banks were entitled to claim as a result of the *Dale* decision was later determined by the Pennsylvania Department of Revenue to be $423,182,471 and the budgeted estimate of the tax that would become payable on January 1, 1984 was approximately $70,000,000.[5]

These developments, and the perceptions that the banks caused them, had unfavorable effects on the good will and public relations of the banks despite their support of measures to recoup the State's revenue loss.[6] There was also the prospect of a significant financial cost to the banks from the Federal income tax effects that would result from the anticipated inevitability of a new State exaction that would be no less than the State's loss of current revenues and refunds of past taxes. It appeared that the refund claims would be accrued as income and Federal taxes paid on them for the year 1983 while the recoupment amount paid to the State would be a deduction in a future period. Thus there would be a financial cost of the time value of the amount paid as Federal taxes for 1983, estimated to exceed $150 million, and not offset as a deduction until a later period.[7]

This sequel to the *Dale* decision confirmed the consensus of the Pennsylvania commercial banks that avoidance of disruption in the state taxing system is in the best interests of the banks as well as of the State.

4. *Id.* at 1840-1841. The state Fiscal Code provides that a taxpayer may file a claim for refund of a tax within five years after it is paid or settled if the tax is later held to be invalid. Pa. Stat. Ann. Tit. 72, §503(4) (Purdon).

5. 14 Pa. Bull. 704 (Mar. 25, 1984); *The Phila. Inquirer*, Nov. 29, 1983 at 26-A.

6. *Id.*; 91 Comm. of Penna. Legislative Journal 1840-1844 (House of Representatives, Nov. 16, 1983).

7. *Id.* at 1840.

The result of the sequel was a legislative action to amend the bank shares tax to provide for a reduction of the taxable value of shares in the pro rata amount equal to the ratio of U.S. securities to total assets held by the bank at the end of each calendar quarter calculated on an annual average of the four quarters. Pa. Stat. Ann. tit. 72 §7701 (Purdon Supp. 1983). Thus a decision of the Court in this case, on the basic question of the validity of a pro rata reduction of the taxable value of shares to reflect the exemption of U.S. securities, could implicate a question of validity of the current Pennsylvania bank shares tax and create for the banks the risk of costs and other consequences that could flow from uncertainty and unpredictability as to their tax liabilities and the State's revenue from the taxes.[8]

8. The statute amending the bank shares tax also adopted an alternative franchise tax measured by income from all sources to take effect if the amended shares tax should be held invalid. Pa. Stat. Ann. Tit. 72, Article XVI, §12(g) (Purdon Supp. 1983). The concerns of P.B.A. about problems stemming from disruption of state taxing methods would be intensified rather than alleviated if this alternative tax should become effective. The reason is that it could be expected to stimulate a number of issues of both Federal and State law which might not be finally resolved for a long period of time. A specific issue, for example, would be whether the tax would qualify as a "nondiscriminatory franchise" tax which could include income from U.S. securities in the tax base in the light of the decision in *Dept. of Rev. v. 1st Fed. S & L. Assn. of Missoula*, 654 P.2d 496 (Mont. 1982), *cert. den.* 77 L.Ed.2d 1378 (1983) which ruled that a franchise tax based on net income had the effect of taxing exempt income.

SUMMARY OF ARGUMENT

For the purpose of a state bank shares tax assessed on the basis of the value of the capital accounts of a commercial bank, the exemption of U.S. securities required by Rev. Stat. §3701, as amended in 1959, is fully recognized by a pro rata reduction of the capital accounts in the same ratio that the U.S. securities bear to the total assets of the bank. This method assures that taxes on bank shares will be reduced in every case by reason of the bank's ownership of U.S. securities. The contention of appellant that the statute requires a gross deduction of the amount of U.S. securities to determine the value of capital accounts would result in a double deduction and for most commercial banks expand the exemption of the securities into a total exemption from state taxes on bank shares.

The statute should not be interpreted to impute to the Congress an intent in adopting the 1959 amendment to eliminate the practical utility of a bank shares tax as a state revenue measure at a time when more than a majority of the states imposed bank shares taxes as a consequence of the historical restrictions on state taxation of national banks. That effect would occur under the gross deduction method by reason of the fact that commercial banks in the ordinary course of business typically hold, as they have in the past, U.S. securities in amounts in excess of equity capital.

The pro rata method of recognizing the exemption of U.S. securities is consistent with the language of the statute and applicable precedents of this Court. Under the pro rata method the securities are not considered in order to assess or compute a tax but to assure that a tax will not be assessed to the extent that such exempt securities are owned in relation to other assets not entitled to exemption. The principle that an exemption should not

shield nonexempt property from taxation has been recognized and applied by both the Congress and this Court and is the appropriate basis for interpretation of the statute in this case.

The contention that the pro rata method would have a significant enough effect on commercial bank investment in U.S. securities to affect Government borrowing costs is hypothetical and unsupported by evidence and appears to be inconsistent with experience. It is not a factor of sufficient bearing on the interpretation of the statute to outweigh the fact that the effect of the gross deduction method would expand the exemption of U.S. securities into an exemption from all state shares taxes for most banks and thereby attribute to the Congress an unspoken purpose in the 1959 amendment to make a basic change in bank taxation in over a majority of the states at that time.

ARGUMENT

I.

In the *American Bank* case this Court decided last year that the 1959 amendment to Rev. Stat. §3701[9] no longer permitted a state tax on bank shares to be computed on the basis of a bank's capital accounts without any deduction for U.S. securities held by the bank.[10] The issue was not tendered and this Court did not decide whether that statute requires a gross deduction of U.S. securities from a bank's assets, as appellant contends, or whether the command of the statute is satisfied, as the Georgia Supreme Court ruled in this case, by a reduction of the bank's net worth by a proportionate amount based on the ratio of U.S. securities to total assets. Amicus submits that the decision of the Court below gives full effect to the exemption of U.S. securities by requiring under the former Georgia statute (as is required under the current Pennsylvania and Virginia statutes) that the taxable value of shares be reduced to assure there is no tax inci-

---

9. The statute, 31 U.S.C. §742 (now replaced, as restated, by 31 U.S.C. §3124(a) read, as amended:

> "All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes."

10. The term "U.S. securities" is used in this brief to include both direct obligations issued by the U.S. Treasury and obligations of Government agencies and corporations issued under Federal statutes which provide for exemption from taxation. Examples are obligations of Federal Home Loan Banks, 12 U.S.C. §1433 and obligations of Federal Land Banks, 12 U.S.C. §2055. It is assumed, *arguendo*, that a decision as to Treasury obligations in this case would extend to such agency obligations.

dence resulting from ownership of U.S. securities in relation to ownership of other assets.

The effect of the pro rata method is evident from a comparison of a bank whose assets are all U.S. securities — its shares would be wholly exempt from tax — with a bank which owns no U.S. securities — its shares would be taxable at full value. On the scale between these extremes, the amount of the exemption, or conversely the taxable value of shares, would vary directly with the amount of the U.S. securities owned by the bank. Every acquisition of U.S. securities would reduce the amount of bank shares tax. Thus the securities have been "considered" in no sense for the purpose of assessing a tax but instead for the purpose of assuring that no tax will be assessed or computed because of ownership of the securities in relation to all of the assets, liabilities and capital accounts of the bank.

Under the gross deduction method urged by appellant, the deduction, whether made from the gross assets or the net assets (and accordingly in either case "considered" for that purpose), would effectively be a double deduction. The simple arithmetic of computing capital accounts requires the deduction of all liabilities from all assets so that elimination of U.S. securities in full from the assets would be the same as a reduction of the capital accounts by the amount of the securities. In view of the fact that the pool of funds from which the securities are acquired results not merely from the capital but also from the liabilities which would have already been deducted to determine the capital accounts, the further deduction of the securities from the capital accounts would result in a double deduction. This effect is illustrated by considering the hypothetical case of a bank which holds no U.S. securities. If it should obtain funds through deposits or borrowing in an amount equal to its capital and invest the funds in U.S. securities, the liability it incurred would be deducted from its assets to calculate its capital and the amount of the securities, under the gross

deduction method, would also be deducted so that no taxable base would remain for a state bank shares tax. The distortion of this double deduction would mean that the exemption of U.S. securities would be exaggerated into a total exemption from all shares taxes to the extent that the amount of U.S. securities owned matched the amount of capital.

The reality of the gross deduction method, therefore, is that it would stultify the bank shares tax as a feasible state revenue measure because it would inflate the exemption of U.S. securities into a total exemption from taxes on the shares of virtually all commercial banks. The regulatory norm for adequacy of bank capital is a ratio of capital to assets between 6.5% and 7%.[11] For all insured commercial banks at the end of 1983 the ratio of equity capital to total assets was 6%.[12] On the same date the ratio of U.S. securities to total assets was 10.45% in the same banks.[13] The commercial banks in Pennsylva-

---

11. See Capital Adequacy Guidelines of Federal Reserve Board and Comptroller of the Currency for national banks and state member banks. Reg. Y App. A, 12 C.F.R. 225.

12. Total equity capital was $140.580 billion and total assets were $2,341.816 billion as reported by the Federal Deposit Insurance Corp., Report of assets and liabilities of insured commercial banks on Dec. 31, 1983 (United States).

13. *Id.* Obligations of the U.S. Treasury were $168.096 billion and obligations of U.S. agencies and corporations were $76.523 billion so that the figure used for total U.S. securities (see ftn. 10 above) is $244.619 billion. These figures vary from the $188.9 billion of federal obligations held by commercial banks stated on page 2 of the brief of the Solicitor General. The explanation may be that the number reported by the Treasury Department appears to be an estimate as indicated by Table 1.41, ftn. 4, Gross Public Dept. of U.S. Treasury, 70 Fed. Res. Bull. A29 (June, 1984). The F.D.I.C. data are from bank call reports. See also the data in the Federal Reserve Bulletin which are limited to domestic offices of insured commercial banks. *Id.* at A70. The difference in the numbers is not crucial to the argument of P.B.A. since all numbers for bank ownership of Treasury obligations alone exceed the equity capital of the banks.

nia on that date had a ratio of equity capital to total assets of 6% and a ratio of U.S. securities to assets of 14%.[14] These ratios on aggregate bases are confirmed by a review of reported data for individual banks most of which hold U.S. securities in amounts in excess of the amounts of their respective capital.[15]

II.

The gross deduction method urged by appellant would in essence attribute to the Congress in 1959 a legislative intent to deprive the states of the practical alternative of selecting a bank shares tax as a method of taxation. There is not a word of evidence in the legislative history of the 1959 amendment of §3701 that Congress intended to reverse a century-old and fundamental Federal policy which, through standards for taxation of national banks that generally were applied to state banks also,[16] permitted state bank shares taxes notwithstand-

14. Total assets were $113.333 billion and equity capital was $6.822 billion. Obligations of the U.S. Treasury were $9.873 billion and obligations of U.S. agencies and corporations were $6.117 billion for total U.S. securities of $15.990 billion. F.D.I.C., Report of assets and liabilities of insured commercial banks on Dec. 31, 1983 (Pennsylvania).

15. Condensed balance sheets of individual commercial banks are set forth in Polk's World Bank Directory (R.L. Polk & Co., Spring 1984).

16. "In limiting the methods by which States might tax national banks, section 5219 indirectly imposed restraints on the taxation of State-chartered banks . . . The section 5219 restrictions . . . encouraged parallel treatment, but the desire to promote equity and competitive balance probably was another important consideration. In any event, differences in tax treatment of national and State banks have not been widespread or substantial." BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, STATE AND LOCAL TAXATION OF BANKS, 92nd CONG., 2d SESS. 11 (Comm. Print, Comm. on Banking, U.S. Senate 1972).

ing the large holdings of U.S. securities by commercial banks. The history of that policy was succinctly stated by Dean Simeon E. Leland as follows:

> "From 1864 to 1923, only real estate and share taxes could be applied to national banks. From 1923 to 1926, States could tax, besides bank-owned real property, only the shares owned or dividends received by shareholders or the net income of the bank. From 1926 through 1969, States could tax national banks only on their real property and one of the following: (a) shares (on an ad valorem basis), (b) net income, or (c) 'according to or measured by net income.' If the tax was on the net income of the bank or 'according to or measured by' its net income, dividends could also be taxed in the incomes of individual shareholders. At all times, discriminatory taxes on national banks were outlawed. All other taxes on national banks were prohibited. Within this narrow framework, States had to develop their systems of bank taxation."[17]

In this historical context, and in the light of the realistic effect of the gross deduction method compared with the pro rata method of recognizing the exemption of U.S. securities, it should not be readily inferred that there was an unspoken purpose on the part of Congress in the 1959 amendment of §3701 to ban the practical utility of what was the prevailing form of state taxation of banks at that time as it had been for about a century before. The language and stated purpose of the amendment, however, require no more than, but are fully observed by, the pro rata method of giving effect to the exemption adopted by the Georgia Court in this case.

Appellant (Brief, at 11-16) seeks to derive from the legislative history of the 1959 amendment support,

17. "The History and Impact of Section 5219 on the Taxation of National Banks", *Id.* 215, 414.

which simply is not there, for its argument that the only way in which the required exemption should be given effect is the gross deduction method. That history, as this Court noted in *American Bank*, was "not extensive". 77 L.Ed.2d at 1081. The text of the amendment added by the Congress to §3701 was the language of the sentence proposed by the Treasury Department. Hearings on Public Debt Ceiling and Interest Rate Ceiling on Bonds Before the House Committee on Ways and Means, 86th CONG. 1st SESS. 80 (1959). Treasury's technical explanation of the language, *Id.* at 69-72, concentrated heavily on the need to prohibit inclusion of U.S. bond interest in the base for a state personal income tax in order to avoid "a serious adverse effect on the sale of United States savings bonds, which are so widely held by individuals . . ." *Id.* at 72. This court ruled in *American Bank* that the language used in the amendment could not be limited to that narrow purpose. This Court did not rule, however, and the sparse legislative history does not support as appellant claims, that Congress intended that the gross deduction method be used for recognition of the exemption in the context of a state tax on corporate shares of stock, based on the value of capital accounts only.

III.

The decision of the Court below is well within the precedents established by this Court. The Georgia Court properly relied on the principle applied in *United States v. Atlas Life Insurance Co.*, 381 U.S. 233 (1965). The thrust of that decision was not influenced by the type of exemption involved, whether it was the municipal bond or U.S. securities exemption, or the type of tax, whether a federal or state levy, as is evidenced by the fact that cases involving both types of exemption and both types of tax were cited and discussed in the Court's opinion in-

terchangeably. The essential point of the case, quoted by the Court below, is that ownership of exempt securities does not create a right to reduce the amount of tax on taxable securities. In *Atlas Life* the contention was made that a life insurance company should be entitled to make a nontaxable addition to policyholder reserves while at the same time excluding all income from exempt securities from the company's taxable income. This Court rejected that claim on the basis of "the principle of charging exempt income with a fair share of the burdens properly allocable to it." 381 U.S. 251, so that there was "no statutory or constitutional barrier," 381 U.S. 239, to a pro rata method of allocating income at issue there.

In the same manner that *Atlas Life* affirmed the principle of the earlier cases it cited that "the tax laws may require tax-exempt income to pay its way", 381 U.S. 247, the Court below properly ruled that ownership of tax-exempt securities should be attributable to the aggregate of the deposit and other liabilities of a bank and its capital accounts. A key function of bank capital is to give the bank the creditability which enables it to incur deposit and other liabilities. The funds provided by such liabilities and capital become a fungible mass invested, collected and reinvested in assets permissible for commercial banks to hold under regulatory statutes, including U.S. securities. In that continuing process it is deemed normal by regulatory authorities, as pointed out above, that the capital will be leveraged into assets as much as 15 times greater than the amount of the capital since a capital-to-assets ratio of 6.5% is considered adequate. Thus the decision below observes the exemption of U.S. securities as applied to a bank shares tax in the context of the reality of the commercial banking business.

The argument on the appellant's side of this case urges the Court to ignore this reality and the principle reaffirmed in *Atlas Life* and to give an exaggerated and distorted effect to the exemption of U.S. securities. The

American Bank decision construed the 1959 amendment of §3701 to change the traditional application of state bank shares taxes insofar as they were assessed without any deduction whatever for holdings of U.S. securities. Nothing in that decision intimated, however, that the amendment also had the more far-reaching effect that it would reduce the bank shares tax to a virtual nullity as a practical source of state revenue nor can such a purpose be readily attributed to the Congress at the time it adopted the amendment. In 1958 shares taxes were used in 27 states[18] and the commercial banks in the aggregate, both before and after that time, held U.S. securities in amounts far in excess of the amounts of equity capital[19] so that the gross deduction method would have eliminated the tax for most commercial banks in these states. Under normal canons of interpretation an intent to require such a sharp change in existing state tax laws cannot be deduced from a statute and legislative history that give no hint, in the legislative setting of the time, of that kind of purpose. It is more reasonable to conclude that Congress intended that the observance of the exemption of U.S. securities be effected in a manner that would be compatible with the contemporary understanding of the effect of exemptions generally. It is also more reasonable to assume that Congress was familiar with, and approved the pro rata method of recognizing exemptions upheld in the *Atlas Life* case since the 1959 statutory provision involved in that case had been adopted by the Congress in the same year shortly before the enactment of the amendment of §3701 involved in this case.[20]

---

18. *Id.* at 386.

19. "Commercial Banks — Assets, Liabilities and Capital Accounts, 1950-1969", *Id.* at 82.

20. The statute involved in *Atlas Life* was enacted as P.L. 86-89 on June 25, 1959 and the amendment to §3701 was enacted as P.L. 86-346 on September 22, 1959.

IV.

The Solicitor General, as amicus, suggests, on the one hand (Brief, at 2), that the pro rata method of eliminating U.S. securities diminishes their marketability so that the Government's cost of borrowing is "enhanced to a significant, if not precisely measurable, extent" and, on the other hand, (Brief, ftn. 6, at 15) that it "seems clear enough that the investment attractiveness of federal obligations" is greater under appellant's contention than under the pro rata method. These claims seem exaggerated. The hypothesis that Treasury borrowing costs would be significantly increased by state shares tax incidents to bank ownership of U.S. securities is merely conceptual and not supported by any empiric evidence. The experience would in fact appear more consistent with a hypothesis that state taxation is a factor of no more than mild effect, if any, on commercial bank participation in the Government securities market.

Commercial banks as a class are the largest single private holders of U.S. securities as the statistical history shows they have consistently been in the past.[21] During that time banks in several states where the largest banks are located have had their U.S. securities subject to state taxation either by inclusion of income from them in the state tax base[22] or, prior to the *American Bank* decision last year, by a tax on the value of shares which was not diminished by the holding of U.S. securities. Yet there is not a scintilla of evidence suggested from the Govern-

---

21. The estimates of U.S. Treasury debt held by various classes of private holders indicate that commercial banks owned approximately 18.5% of such debt. The estimate at the end of 1979 was 17.8%. 70 Fed. Res. Bull. A29 (June, 1984). The amounts of the holdings at various dates from 1950 to 1959 are in the table cited in ftn. 19 above.

22. See e.g. CCH State Tax Reports for New York, ¶10-410; Massachusetts, ¶14-008b; and Florida, ¶10-303. See also *Leland*, *op. cit supra* ftn. 17 at 403-405.

ment's huge borrowing experience[23] that its largest class of private buyers of securities, the commercial banks, have been influenced by state tax effects on their buying decisions to an extent that would have a consequence on the Government's financial operations.

The reasons why state tax effects should not be presumed to have a material effect on bank decisions to invest in U.S. securities become evident from an examination of the reasons for the investments and the total tax incidents of them. U.S. securities are the most creditworthy and the most liquid of the interest-bearing assets regularly available to banks in large volume because of the massive size of the market in them and the credit standing of the Government derived from its taxing powers.[24] The securities are especially suitable for bank ownership since they provide a secondary reserve for unanticipated withdrawals of deposits and may be converted readily into available funds for lending purposes in times of increased credit demands. The variety of maturities for which the securities may be purchased makes them particularly useful for matching assets and liabilities in order to reduce the element of risk from fluctuations in interest rates for banks which desire to do so. In addition, the securities supply the need for qualified assets required for pledging against public deposits.[25]

The most important tax incident of U.S. securities is that the income from them is subject to Federal income tax at the marginal rate of 46% and, under section 582 of the Internal Revenue Code, a gain from a sale of such securities by a commercial bank is subject to tax at the

23. In 1983 the total net borrowings on U.S. Government securities of $254.4 billion was over 40% of the total net borrowing of $630.8 in U.S. credit markets. 70 Fed. Res. Bull. A40 (June, 1984).

24. Interest rates on U.S. Treasury obligations are characteristically the lowest rates for comparable maturities in the money and capital markets. *Id.* at A24.

25. See e.g. U.S. Treasury Circular No. 92 imposing collateral security requirements for tax and loan accounts. 31 C.F.R. 203.15.

ordinary income tax rate rather than the capital gains rate. Any state tax incurred by reason of the investment is a deduction from the taxable income for Federal tax purposes. The marginal after-Federal tax effect of a state tax is thus 54% of the amount of the state tax paid so that in the ordinary case the Federal tax rate is many times greater than the effective rate under a bank shares tax.[26] Thus, in relation to the reasons banks have to acquire U.S. securities in contrast to alternative investments that are available, it cannot be as readily assumed as the Solicitor General implies that a minor difference in total after-tax return as a result of the pro rata method would be "significant" enough to shift investment choices to such a widespread extent that it would affect rates in the U.S. securities market.

The potential effect of state shares tax incidents would vanish completely in the very common case in which a bank already holds U.S. securities in an amount in excess of capital accounts if there were a gross deduction of the securities. However, the Solicitor General does not and cannot suggest that the income from the securities could not continue to be included in "nondiscriminatory franchise or other nonproperty taxes" permitted by §3701.[27] Thus the supposed finan-

26. The effective rate under a shares tax is not the nominal rate applied to a particular asset since the tax is based on the value of the capital accounts. Capital accounts of commercial banks are typically in the range of 6% of assets as shown by the data on pages 9-10 above. Thus assuming for illustration a shares tax rate of 10 mills or 1%, the absence of a deduction of any amount of a security from the shares tax base would have an after-Federal tax effect, at the marginal rate, of only 0.0324% of the amount not deducted (i.e. the product of 6% × 1% × 54%).

27. If the position of the Solicitor General in this case should be upheld, it could be expected that states with bank shares taxes would shift to such franchise taxes. See ftn. 8 above. On July 13, 1984, Texas repealed its bank share stax, effective June 1, 1985, presumably as a consequence of the *American Bank* decision and made banks subject to the Texas corporate franchise tax. H.B. 122, 2nd Spec. Sess. To the extent that new state franchise taxes include

cial effect of sustaining appellant's argument in this case would occur only in banks in states which have shares taxes and only in such of those banks whose U.S. securities are not in excess of the value of their shares at the time of each investment. It is doubtful on its face that the investment decisions of that group of banks would have a large enough weight in the vastness of the money and capital markets to have any measurable bearing on the level of interest rates.

The Solicitor General's contention is, accordingly, speculative at best and is insufficient to outweigh the practical effect of the gross deduction method, i.e. to take away from the states the choice of a bank shares tax as a feasible revenue measure. The statute requires that the Federal Government have an exemption for its obligations which the pro rata method duly observes. It does not also require, as the appellant contends, that the exemption be so magnified that ownership of U.S. securities in the everyday course of business of almost all banks should free their shares from all state taxes.

CONCLUSION

The judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

John J. Brennan
P. J. DiQuinzio
Dechert Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102

August 13, 1984

NOTE 27 — *(Continued)*
income from U.S. securities in the tax base, as permitted by §3701, the effect of the Solicitor General's position in this case will be to increase, not decrease, taxation of U.S. securities.

AMICUS CURIAE

BRIEF

No. 83-1620

(12)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FIRST NATIONAL BANK OF ATLANTA, ETC.,
Appellant

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS, *et al.*,
Appellees

On Appeal from the Supreme Court of Georgia

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, AS AMICUS CURIAE IN SUPPORT OF APPELLEES

JOHN P. KRILL
Deputy General Counsel
Commonwealth of Pennsylvania

PAUL A. ADAMS
Chief Counsel
Department of Banking
Commonwealth of Pennsylvania

GEORGE T. BELL
Counsel of Record
Chief Counsel
Department of Revenue
Commonwealth of Pennsylvania
11th Floor, Strawberry Square
Harrisburg, PA 17127
(717) 783-3682

August 15, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Rev. Stat. § 3701 requires that the total dollar value of federal obligations must be deducted in full from the base of the bank shares tax when only a proportionate part of the obligations are considered in arriving at the tax base?

INTEREST OF THE AMICUS CURIAE

The Commonwealth of Pennsylvania amended its bank shares tax in response to the decision by the Pennsylvania Supreme Court in the case of *Dale National Bank v. Commonwealth of Pennsylvania*, 502 Pa. 170, 465 A.2d 965 (1983). The revised Pennsylvania tax excludes federal obligations to the extent that they are considered in arriving at the base of the tax. Laws of Pa., Act 1983-66, Pa. Stat. Ann. tit. 72, § 7701.1 (Purdon Supp. 1983). This exclusion from the tax base was accomplished by the Pennsylvania Legislature through the use of a proportionate deduction for federal obligations.

The Georgia Supreme Court has decided that since only a proportionate part of federal obligations are reflected in shareholders equity, only that portion must be deducted in arriving at the tax base to satisfy Rev. Stat. § 3701.

Since the Georgia tax is similar to Pennsylvania's revised bank shares tax, the outcome of this case will impact upon the Commonwealth. In this regard, exclusion of federal obligations through a flat deduction rather than a proportionate deduction in fact generally eliminates the tax base of banks subject to the Pennsylvania tax since these banks normally hold federal obligations in excess of shareholders equity. Additionally, this case may impact upon capital stock or other net worth taxes imposed on nonfinancial institutions, such as the Pennsylvania Capital Stock tax, which has for over 50 years permitted by statute a proportionate deduction for federal obligations and other tax exempt assets. Laws of Pa., Act 1931-250, Pa. Stat. Ann. tit. 72, § 1896 (Purdon 1974).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF THE AMICUS CURIAE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
SUMMARY OF ARGUMENT	1
ARGUMENT	2
THE GEORGIA BANK SHARES TAX APPLIED BY THE COURT BELOW IS CONSISTENT WITH REV. STAT. § 3701 IN THAT FEDERAL OBLIGATIONS ARE EXCLUDED FROM THE TAX BASE	2
CONCLUSION	8

TABLE OF AUTHORITIES

CASES	Page
American Bank and Trust Company v. Dallas County, —— U.S. ——, 103 S. Ct. 3369 (1983)	1, 3, 5
Dale National Bank v. Commonwealth of Pennsylvania, 502 Pa. 170, 465 A.2d 965 (1983)	ii
Memphis Bank and Trust Company v. Garner, —— U.S. ——, 103 S. Ct. 692 (1983)	3
Missouri Insurance Company v. Gehner, 281 U.S. 313 (1930)	4
Society for Savings v. Bowers, 349 U.S. 143 (1955)	3
United States v. Atlas Life Insurance Company, 381 U.S. 233 (1965)	2, 4
STATUTES	
Rev. Stat. § 3701	*passim*
Laws of Pa., Act 1983-66, Pa. Stat. Ann. tit. 72, § 7701.1 (Purdon Supp. 1983)	ii
Laws of Pa., Act 1931-250, Pa. Stat. Ann. tit. 72, § 1896 (Purdon 1974)	ii
MISCELLANEOUS	
Paul F. Smith, Money and Financial Intermediation. (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1978) p. 137	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1620

FIRST NATIONAL BANK OF ATLANTA, ETC.,
Appellant

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS, *et al.*,
Appellees

On Appeal from the Supreme Court of Georgia

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA, AS AMICUS CURIAE IN SUPPORT OF APPELLEES

The Commonwealth of Pennsylvania respectfully urges the Court to sustain the decision below.

The Brief of Appellant, as modified by the additions in the brief of Appellees, correctly sets forth the Opinions Below, Jurisdiction, Statutes Involved, and Statement of the Case.

SUMMARY OF ARGUMENT

Rev. Stat. § 3701 requires that federal obligations not be included, directly or indirectly, in state property taxes. *American Bank and Trust Company v. Dallas County*, —— U.S. ——, 103 S. Ct. 3369 (1983).

The protection afforded federal obligations by Rev. Stat. § 3701 and the Constitution are concurrent. Under this Court's decision in *United States v. Atlas Life Insurance Company*, 381 U.S. 233 (1965) and in view of the legislative history discussed therein, a prorata deduction for federal obligations is constitutionally valid and thus valid under Rev. Stat. § 3701.

The method of exemption of federal obligations proposed by Appellant is not in accordance with financial realities. Computing the tax utilizing a flat deduction as urged by the Appellant would result in a deduction which is far in excess of the amount of federal obligations reflected in shareholders equity, in most cases totally eliminating the tax base. A reversal of the lower court would extend Rev. Stat. § 3701 far beyond its intended scope.

ARGUMENT

THE GEORGIA BANK SHARES TAX APPLIED BY THE COURT BELOW IS CONSISTENT WITH REV. STAT. § 3701 IN THAT FEDERAL OBLIGATIONS ARE EXCLUDED FROM THE TAX BASE.

Prior to 1959, Rev. Stat. § 3701, 31 U.S.C. § 742,[1] provided:

> All stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.

In 1959, the following sentence was added to Rev. Stat. § 3701:

> *This exemption extends to every form of taxation* that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except

[1] Rev. Stat. § 3701 was unofficially codified as 31 U.S.C. § 742 in 1926. In 1982, title 31 was reformulated without substantive change and 31 U.S.C. § 742 was replaced by 31 U.S.C. § 3124(a).

> nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes. (emphasis supplied)

The 1959 amendment was born of the desire of Congress to eliminate the distinction between taxes imposed on federal obligations and taxes imposed on discrete property interests measured by federal obligations. *American Bank and Trust Company v. Dallas County, supra.* This objective was accomplished by defining the type or form of taxation to which the exemption applies. The second sentence of Rev. Stat. § 3701, however, does not contain the exemption of federal obligations from state or local taxation; the first sentence contains the exemption.

In *American Bank*, the issue was whether the 1959 amendment to Rev. Stat. § 3701 extends to a state bank shares tax. The decision in *American Bank* was that the Texas bank shares tax is a type or form of taxation covered by Rev. Stat. § 3701 and thus within the "broad sweep" of the exemption. The decision, however, did not specify the manner in which the exemption is to be applied. This is the subject matter of the first sentence of Rev. Stat. § 3701 and the present appeal.

The scope of the exemption under Rev. Stat. § 3701, contrary to the brief of Appellant, is concurrent with but not greater than the immunity from state taxation granted to federal obligations under the United States Constitution. In *Memphis Bank and Trust Company v. Garner*, —— U.S. ——, 103 S.Ct. 692, 696 (1983), this Court stated that "[o]ur decisions have treated Section 742 [Rev. Stat. § 3701] as principally a restatement of the constitutional rule" concerning the immunity of federal obligations from state and local taxation. In *Society for Savings v. Bowers*, 349 U.S. 143, 144 (1955), this Court stated that Rev. Stat. § 3701 "embodied" the constitutional rule against taxation of federal obligations by state and local authorities. In fact, no case has been cited

in which this Court has held that the scope of the exemption contained in Rev. Stat. § 3701 is different from the constitutional tax immunity rule.

On the other hand, in *United States v. Atlas Life Insurance Company, supra*, this Court, in a decision involving the federal taxation of insurance companies, held that a prorata deduction, similar to that required by the Georgia Supreme Court, did not violate the constitutional prohibition against the taxation of governmtnal obligations. In that case, this Court explicitly rejected[2] the rationale of *Missouri Insurance Company v. Gehner*, 281 U.S. 313 (1930) and similar cases which had held that a proration of government obligations was not an acceptable method of exempting such obligations from taxation.

In the *Atlas Life* decision, this Court, in discussing the prorata deduction provided in the Life Insurance Company Income Tax Act of 1959, at 241-242, stated:

> As time and again stated in the Committee Report and by those who presented the bill on the floor of the Senate, the purpose of the formula provided by the Senate was to avoid taxing exempt interest. (footnote omitted) Senator Byrd, the Committee chairman, stated that "[i]n providing the formula I have described to the Senate it was the intention of the committee not to impose any tax on tax exempt interest." 105 Cong. Rec. 8401. It is extremely difficult to read the hearings, the reports, and the debates without concluding that in the opinion of Congress the formula it provided, without adjustment under § 804(a)(6) or § 809(b)(4), did not impose a tax upon exempt interest in either the statutory or constitutional sense.

[2] Although *Atlas Life* did not specifically reach the question of the validity of *Gehner* under Rev. Stat. § 3701, 381 U.S. at 245, n.16, the protection afforded by Rev. Stat. § 3701 has been viewed as concurrent with the constitutional protection. Indeed, the opinion in *Gehner* contains no indication that the statutory protection and the constitutional protection are different.

The statute considered by the Court in *Atlas Life* was enacted by Congress in 1959 and the amendment to Rev. Stat. § 3701, which added the second sentence of the section, was subsequently enacted by Congress in the same year. Due to the extensive discussion and debate in Congress with regard to the proration of tax exempt income, Congress was aware and believed that a prorata exemption for governmental obligations did not violate the constitutional restriction against the taxation of governmental obligations when the second sentence of Rev. Stat. § 3701 was enacted into law.

Both this Court in *Atlas Life* and Congress have decided that a proration of tax exempt interest did not violate the constitutional rule against the taxation of exempt obligations or interest. Likewise, this Court should hold that application of a prorata deduction of federal obligations in the taxing of financial institutions as allowed by the Georgia Supreme Court does not violate the protection afforded by the Constitution as restated in Rev. Stat. § 3701. Any other result would necessarily cast doubt on the continued validity of the Court's opinion in *Atlas Life* and is contrary to the understanding of Congress in 1959 when Rev. Stat. § 3701 was amended.

In *American Bank and Trust Company v. Dallas County, supra*, the taxpayer was only seeking "that the value of their bank shares be reduced by the proportionate value of the United States obligations held by the bank." 103 S. Ct. 3373. However, Appellant in this case seeks to exclude an amount which far exceeds, by several multiples, the value of the federal obligations reflected in shareholders equity.

In its most basic form, shareholders equity (net worth) is total assets minus total liabilities. A tax on shareholders equity thus is actually a tax on the excess of total assets over total liabilities. Appellant in challenging the proportionate deduction method adopted by the Georgia Supreme Court has asked, in effect, this

Court to make an unrealistic presumption: that this excess of total assets over total liabilities is attributed to federal obligations when in fact federal obligations are proportionately attributable to *both* equity and liabilities.

An understanding of a bank's creation and operation highlights the fallacy in Appellant's basic premise. At inception, a banking corporation is established with equity, *i.e.*, money for stock. It then starts its business and expands it by acquiring deposits from individuals (liabilities), loaning those funds to others and investing those funds in securities, a substantial amount of which are federal obligations (assets). Thus, the federal obligations which a bank owns are funded by liabilities in the form of deposits. This becomes obvious when deposits are withdrawn. The bank has to satisfy its liabilities and it does so by selling its most liquid assets which typically include federal obligations.

> The first line of defense against deposit withdrawals lies in the bank's portfolio of short-term marketable securities or its secondary reserves. These securities provide liquidity in two ways. First, the regular turnover of funds provides a stream of cash flow that can also be diverted to cover deposit withdrawals. Second, the securities can be sold to cover deposit losses, if necessary. *Paul F. Smith, Money and Financial Intermediation.* (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1978) p. 137.

Thus, Appellant's presumption that federal obligations are attributable solely to shareholders equity and not to liabilities is inconsistent with standard banking practices and produces irrational results.[3] To adopt the presumption urged by Appellant would be in effect to hold that a tax on all of the shareholders equity in a bank is in fact only imposed on one category of assets, *i.e.*, federal obligations.

[3] For example, a bank with total assets of $2,000,000, liabilities of $1,800,000 and no federal obligations would have a net worth of $200,000. By the simple expedient of borrowing $200,000 and investing the proceeds in federal obligations, the net worth of the bank would be reduced to zero under the presumption espoused by Appellant.

The Commonwealth of Pennsylvania, as amicus curiae, also asks this Court to accept a presumption: that each and every asset which Appellant or any other bank might own is proportionately represented in shareholders equity. This presumption produces a method of determining the tax base of financial institutions which is consistent with financial reality while implementing the intention of Congress to exempt federal obligations from state and local taxation.

In summary, since the protection afforded by Rev. Stat. § 3701 merely embodies the constitutional tax immunity of governmental obligations and based upon the conclusion of Congress that a prorata deduction meets constitutional requirements and this Court's decision in *Atlas Life*, the prorata deduction for United States obligations under the Georgia bank shares tax is constitutionally and statutorily valid. Additionally, the prorata deduction, as required by the Georgia Supreme Court, is a legitimate and rational method of determining that portion of the net worth of a bank which may be subjected to tax. The proposal submitted in the brief of the Appellant and briefs of amicus curiae who support Appellant rely upon a principle which, in effect, would match federal obligations against net worth while other assets are matched against liabilities. This principle is artificial, arbitrary and simply not supported by business practices and realities.

CONCLUSION

The decision of the lower court should be affirmed.

Respectfully submitted,

JOHN P. KRILL
Deputy General Counsel
Commonwealth of Pennsylvania

PAUL A. ADAMS
Chief Counsel
Department of Banking
Commonwealth of Pennsylvania

GEORGE T. BELL
Counsel of Record
Chief Counsel
Department of Revenue
Commonwealth of Pennsylvania
11th Floor, Strawberry Square
Harrisburg, PA 17127
(717) 783-3682

August 15, 1984

AMICUS CURIAE

BRIEF

(13)

No. 83-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF
CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE
COMMISSIONER,
Appellees.

On Appeal From The Supreme Court of Georgia

BRIEF BY THE CITIZENS AND SOUTHERN NATIONAL BANK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

BENJAMIN F. JOHNSON, III
JOHN L. COALSON, JR.*
Alston & Bird
1200 Citizens and Southern
National Bank Building
35 Broad Street
Atlanta, Georgia 30335
(404) 586-1500

**Counsel of record*

August 15, 1984

14pp

TABLE OF CONTENTS

	Page
Table of Authorities	i
Question Presented	ii
Interest of Amicus Curiae	iii
Brief by The Citizens and Southern National Bank as Amicus Curiae in Support of Appellees	1
Summary of the Argument	2
Argument	3
Conclusion	11

TABLE OF AUTHORITIES

Cases

American Bank & Trust Co. v. Dallas County, 103 S.Ct. 3369 (1983)	*passim*
Bartow County Bank v. Bartow County Board of Tax Assessors, 251 Ga. 831 (1983), vacated and remanded 103 S.Ct. 3563 (1983)	6

Statutes

Rev. Stat. §3701, as amended by Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 622	*passim*
Former O.C.G.A. §48-6-90 *et seq.*, prior to amendment by 1983 Ga. Laws 1350	3

QUESTION PRESENTED

Whether a Georgia property tax on bank shares, computed on the basis of the bank's net assets, but with a deduction for a portion of the tax-exempt federal securities held by the bank sufficient to eliminate such federal securities from the net asset tax base against which the tax is measured, violates Rev. Stat. §3701, as amended.

INTEREST OF AMICUS CURIAE

The Citizens and Southern National Bank, as successor in interest to The Citizens and Southern Bank of Bartow County, was a party to one of the companion cases below. As the largest bank in the State of Georgia, with banking operations in more than 70 counties and municipalities in the State, C&S will be directly affected by the Court's decision in this case in substantially the same manner as Appellant First National Bank of Atlanta. However, C&S did not join in this appeal by The First National Bank of Atlanta because of C&S' strong conviction that the decision of the Georgia Supreme Court represents a correct application of Rev. Stat. §3701, as amended, and is wholly consistent with this Court's opinion in *American Bank & Trust Co. v. Dallas County*. C&S therefore submits this brief in support of Appellee Taxing Authorities urging that the decision of the Supreme Court of Georgia be affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1620

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF
CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE
COMMISSIONER,
Appellees.

On Appeal From The Supreme Court of Georgia

BRIEF BY THE CITIZENS AND SOUTHERN NATIONAL BANK AS AMICUS CURIAE IN SUPPORT OF APPELLEES

The Citizens and Southern National Bank respectfully submits this brief as amicus curiae with the written consent of the parties. Statements of consent have been submitted to the Clerk of the Court. C&S supports the position of the Appellee Taxing Authorities urging that the decision of the Supreme Court of Georgia be affirmed.

SUMMARY OF ARGUMENT

In *American Bank & Trust Co. v. Dallas County*, 103 S.Ct. 3369 (1983), this Court said that Congress, by its 1959 amendment to Rev. Stat. §3701, "intended . . . to invalidate all taxes *measured . . . by the value of federal obligations*." (Emphasis supplied.) This means, we believe, that what is required to comply with the federal statute and hence render the Georgia bank share tax constitutional is not necessarily a deduction from net worth of the full value of federal securities owned by the bank, but rather a deduction of the federal securities to the extent their value is otherwise included in the net worth base against which the tax is measured.

We believe the "proportionate" deduction permitted by the Georgia Supreme Court accomplishes that result, without permitting the portion of the value of federal securities *not* otherwise included in the tax base to shield from taxation other admittedly taxable assets. Nor is there a risk that the proportionate deduction produced by the formula would not be sufficient in some cases to eliminate federal securities completely from the tax base, since it would remain open to banks to establish that in their particular cases a larger deduction is necessary to achieve complete elimination of the value of their federal securities from the tax base.

Finally, we believe that, contrary to the assertions by Appellant and the Solicitor General, the proportionate deduction authorized by the Court below would, if anything, be more effective than the full value deduction urged by Appellant in stimulating increased levels of banks' holdings of federal securities, thereby tending to decrease the federal government's cost of borrowing.

ARGUMENT

In *American Bank & Trust Co. v. Dallas County*, 103 S.Ct. 3369 (1983), this Court held that Rev. Stat. §3701, as amended by Act of Sept. 22, 1959, Pub. L. No. 86-346, 73 Stat. 622, prohibits indirect state taxation of U. S. obligations via bank share taxes, and that a bank share tax measured by the net worth of a bank, but providing no deduction for federal securities owned by the bank, would be in conflict with the federal prohibition and hence unconstitutional. *American Bank & Trust Co. v. Dallas County* did not, however, expressly address the nature of the deduction for federal securities that would be necessary to render such a share tax constitutional.

The Georgia Supreme Court held in this case, and in two companion cases that were not appealed, that Rev. Stat. §3701, as construed in *American Bank & Trust Co. v. Dallas County*, required that banks, in computing their bank share tax liability, be permitted a deduction sufficient to eliminate federal securities owned by the banks from the tax base to which the tax applied. Under the Georgia statute,[1] that tax base would be the banks' net worth, less certain other deductions expressly allowed by the statute and not in issue here. The Georgia Court held, in the absence of any showing by any of the three banks before it that the federal securities they held had been purchased and held other than from general commingled funds provided in part from net worth sources and in part from deposits and other "liability" sources not part of the tax base, that a "proportionate" deduction was necessary to eliminate federal securities entirely

---

[1] Former O.C.G.A. §48-6-90 *et seq.* The Georgia bank share tax was repealed effective January 1, 1984. 1983 Ga. Laws 1350.

from the tax base, as required by Rev. Stat. §3701, without permitting that portion of the federal securities owned by banks which were *not* otherwise included in the tax base to be used to shield from taxation assets that were admittedly subject to tax. Thus, in the absence of any attempt by the banks to show that their holdings of federal securities had been financed other than proportionately out of liabilities and net worth, the Georgia Supreme Court permitted a deduction equal to a proportion of the banks' net worth, with the numerator of the fraction used being the federal securities owned by the banks and the denominator being the banks' total assets.

Appellant now argues before this Court that, to preserve the constitutionality of Georgia's former bank share tax statute, banks must be permitted to deduct from their net worth the full value of the federal obligations they held. In support of this position, appellant emphasizes language from the *American Bank & Trust Co.* case to the effect that Congress' intent in adopting Rev. Stat. §3701, as amended, was "to bar shares taxes to the extent they consider federal obligations in the computation of the tax," 103 S.Ct. 3375; that Section 3701 "prohibits any form of tax that would require consideration of federal obligations in computing the tax," 103 S.Ct. at 3376; and that, in this context, "the word 'considered' means taken into account, or included in the accounting." 103 S.Ct. at 3374.

Applied literally, this broad language presumably would invalidate the Georgia share tax *regardless* of the amount of the deduction allowed, since even a deduction for the full value of all federal securities held by the banks would "consider" the securities in that they would be "taken into account" in computing the tax through the very

process of deducting the amount thereof from the bank's net worth. If this were the result intended by the Court, however, there would seem to have been no reason to remand the case to the Georgia Supreme Court for further consideration—the tax would simply have been unconstitutional under the authority of *American Bank & Trust Co. v. Dallas County*.

Such an application of that language does not appear to be what the Court had in mind, however. Rather, a study of the Court's opinion in *American Bank & Trust Co. v. Dallas County*, as well as the history and purpose of Rev. Stat. §3701 as discussed in the decision, demonstrates that what the federal provision requires, in prohibiting "consideration" of federal obligations, is simply that the tax be applied and computed *as if the bank owned no federal securities whatsoever*. This is made clear, we think, by the last sentence of Section III-B of the Court's opinion: "Congress intended to sweep away formal distinctions and to invalidate all taxes *measured* directly or indirectly *by the value of federal obligations*. . . ." 103 S.Ct. at 3377 (emphasis added). This, we think, indicates that what is required to comply with the federal statute and hence render the Georgia bank share tax constitutional is not necessarily a deduction from net worth of the full value of the federal securities owned by the bank, but rather a deduction of the federal securities *to the extent their value is otherwise included in the base against which the tax is measured*.

This is precisely what the "proportionate" deduction permitted by the Georgia Supreme Court would do. It would permit banks to exclude federal securities completely from the base against which the tax is applied, without allowing that portion of the federal securities

that would not otherwise be included in the net worth tax base to be used to shield from taxation the value of assets that admittedly are proper subjects of state and local taxation.[3]

The Georgia Supreme Court has not, however, adopted an inflexible formula that might operate in particular cases to result in the indirect taxation of a portion of a bank's federal securities by not permitting a deduction sufficient to exclude the entire amount of such securities from the net worth tax base. It was argued before the Georgia Supreme Court, and has never been denied by the Appellee Taxing Authorities, that if a bank in a particular case could establish that federal securities in fact represent a larger portion of its net worth than would be produced by application of the general proportionate formula, the bank would be entitled to claim a larger deduction sufficient to eliminate completely the value of its federal securities from its net worth. Although the Georgia Supreme Court did not have to decide the point on the facts before it because none of the banks involved had made such a showing,[3] it did state that its intent was to afford "deduction of federal obligations to the full extent they are represented in net worth." [4]

This, we think, is precisely what Rev. Stat. §3701 is intended to accomplish—to ensure that federal securities

---

[2] As the Georgia Supreme Court recognized, that would be the effect of allowing a deduction from net worth of the full value of federal securities owned by banks. *Bartow County Bank v. Bartow County Board of Tax Assessors*, 251 Ga. at 834 (Juris. Statement App. at A-5). See also Appellees' Motion to Dismiss at 9.

[3] *Bartow County Bank v. Bartow County Board of Tax Assessors*, 251 Ga. at 834 n.3; Juris. Statement App. at A-4.

[4] 251 Ga. at 834.

are not directly or indirectly subjected to tax by permitting their value to be included in the base to which a state or local tax applies. There was no intent that ownership of federal securities be permitted to afford an opportunity to shield the value of other admittedly taxable assets from taxation, as would effectively be the case under the "full value" deduction urged by Appellant.

Appellant criticizes the proportionate deduction method adopted by the Georgia Court as being based on the "arbitrary theory" that a bank's federal obligations "are directly offset by a proportion of its liabilities, and that deduction of only a mathematically corresponding share" of such federal securities is sufficient to eliminate them from consideration in the tax base. We do not find that theory to be at all arbitrary. In fact, we submit that in the case of virtually every bank, the federal securities it holds as assets are financed in large part through funds provided by purchasers of C.D.'s, or other similar "liability" sources rather than entirely out of equity funds.

Tracing the source of the particular funds used to purchase federal securities might be difficult or perhaps even impossible, for the very reason underlying the proportionate deduction theory—such securities are generally purchased by banks out of general funds available from all sources—partly from net worth and partly from liability sources. Appellant, however, in effect asks this Court to mandate an irrebuttable presumption that every bank's ownership of federal securities is financed entirely out of capital stock or surplus, with no portion thereof being financed from funds received from depositors or other liabilities—a presumption not only at least equally arbitrary to that underlying the proportionate deduction

theory, but also one, in our view, having absolutely no basis in reality.[5]

Finally, we would seriously question the Solicitor General's assertion [6] that permitting anything less than a full deduction for the entire value of all federal securities owned by banks in calculating their state or local share tax liability would make them less attractive to banks, who are major holders of such securities, and could therefore significantly increase the federal government's cost of borrowing. Such an assertion is not only entirely unsupported in the record or otherwise, but is in fact based on what we believe to be an entirely false premise: *i.e.*, that the availability of a proportionate deduction versus a deduction for the full value of all federal securities owned by the bank would adversely impact banks' decisions to hold federal securities.

It is true that banks are major holders of federal securities. The level of any bank's holdings of federal securities, however, will be determined by many factors, including regulatory considerations, the composition of its balance sheet, its need to pledge such securities to secure governmental deposits, and many other business reasons. It is these kinds of factors, together with the extreme liquidity and safety offered by investments in federal securities,

---

[5] We would note, however, that if such a situation *could* be shown actually to exist, the Taxing Authorities have never denied that the bank in question would be entitled to a deduction for the full value of its federal securities. There is no reason, then, for this Court in effect to require states to base their taxing statutes on the assumption that such a situation—which will almost certainly never exist in the real world—is the norm.

[6] Brief of United States as Amicus Curiae In Support of Jurisdictional Statement, at 3. Brief of United States as Amicus Curiae Supporting Appellant, at 2, 15 n.6.

that account for the substantial level of bank ownership of federal securities, not consideration of whether ownership of such securities will entitle them to a full versus a partial deduction for purposes of state bank share taxes.

In fact, to the extent any bank's decision to hold more versus less of its assets in the form of federal securities might be influenced at all by the extent of the deduction such securities would provide against its state bank share tax liability, we agree with Appellees that it is more likely that a proportionate deduction method, which would ensure at least some marginal tax advantage for *every* incremental increase in the level of ownership of federal securities by the bank, would actually do more to stimulate bank purchases of federal securities than would the arbitrary full value deduction urged by Appellant. While the full value deduction might encourage a bank to ensure that it owned a sufficient level of federal securities to eliminate its state share tax liability, banks in fact almost invariably own at least that level of federal securities irrespective of whether a full deduction, a partial deduction, or no deduction at all is allowed against their bank share tax base.[7] The full value deduction, however, unlike the proportionate deduction approved

---

[7] As Appellees have noted (Motion to Dismiss at 8-9 n.4), First Atlanta itself held over $8.5 million in federal securities during the period in issue. R.58. Absent a deduction for such federal obligations, First Atlanta's share tax value base would have been $4,748,426.77. R.45. First Atlanta gained no share tax benefit from its marginal purchase of more than $3.8 million in federal obligations. It is therefore clear that share tax considerations did not cause First Atlanta to hold federal obligations and that its holdings of federal securities would not diminish in the absence of a deduction for the full value of such securities in computing its share tax. Documents submitted to the Georgia Supreme Court suggest that this pattern held for nearly every bank in the state. [Continued on next page.]

by the Georgia Supreme Court, would provide no incentive to banks to increase their federal securities ownership beyond that level they would hold irrespective of tax considerations. Thus, we believe the proportionate deduction method would, if anything, be more likely to increase the levels of federal securities owned by banks, thereby tending to *decrease* the federal government's cost of borrowing.

[Footnote 7, continued]

Therefore, it is clear that, for reasons other than tax considerations, virtually all banks typically own a significant amount of federal securities—an amount almost always well in excess of any share tax liability they would otherwise face. This being so, the full value deduction urged by Appellant would produce no tax benefit whatsoever for additional marginal purchases of federal securities beyond the level the banks would hold anyway for non-tax-related reasons. The proportionate deduction method, on the other hand, would ensure that every incremental purchase of federal securities, even at levels above those banks would normally hold anyway for business reasons, would provide some marginal tax benefit. The proportionate method therefore might actually do more to stimulate additional bank purchases of federal securities than would the full value deduction urged by Appellant.

CONCLUSION

For the foregoing reasons, C&S believes that Appellant's position that Rev. Stat. §3701 requires that banks, in computing their Georgia share tax liability, be allowed to deduct from their net worth the full value of all federal securities owned by them, should be rejected by this Court, and the decision of the Georgia Supreme Court should be affirmed.

Respectfully submitted,

BENJAMIN F. JOHNSON, III

JOHN L. COALSON, JR.

ALSTON & BIRD
1200 Citizens and Southern
National Bank Building
35 Broad Street
Atlanta, Georgia 30335
(404) 586-1500

August 15, 1984

APPELLEE'S

BRIEF

NO. 83-1820

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FIRST NATIONAL BANK OF ATLANTA, etc.,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS, et al.
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR APPELLEES

MICHAEL J. BOWERS
Attorney General of Georgia

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

VERLEY J. SPIVEY
Senior Assistant
Attorney General

JAMES C. PRATT
Assistant Attorney General

Counsel for Appellee
Marcus E. Collins, Sr.,
as State Revenue
Commissioner of Georgia

G. CAREY NELSON
Counsel of Appellee
Bartow County Board
of Tax Assessors

COUNSEL OF RECORD:

JAMES C. PRATT
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4165

August 15, 1984

TABLE OF CONTENTS

Page

Table of Authorities ii

Response to Appellant's Statement of the Case 2

Summary of Argument 5

Argument 6

A. As Now Construed, The Georgia Bank Share Tax Statute Imposes No Tax at All on Exempt Values 6

B. Rev. Stat. § 3701 Only Prohibits State Taxes Which Burden Federal Obligations, And Does Not Require That Federal Obligations Be Allowed To Shelter Non-Exempt Assets from Tax 10

1. Georgia's Method is Permitted By the Language of Rev. Stat. § 3701 10

2. Georgia's Method Effectuates the Intent of Congress 13

3. Georgia's Method is Supported by the Decisions of this Court 16

C. Affirming The Judgment Below Will Not Lead To Arbitrary Action by States or Make Bank Investment Decisions More Uncertain ... 21

Conclusion 23

Certificate of Service 24

Appendix

TABLE OF AUTHORITIES

Page

Cases

American Bank & Trust Co. v. Dallas County, 463 U.S. ____, 103 S.Ct. 3369 (1983) 1, 2, 5, 11, 13

Bank of Commerce v. New York City, 2 Black (67 U.S.) 620 (1863) 17, 18, 19

Bank Tax Case, 2 Wall. (69 U.S.) 200 (1865) 17, 18, 19

Dale National Bank v. Commonwealth, 465 A.2d 965 (Pa. 1983) 5, 9

Memphis Bank & Trust Co. v. Garner, 459 U.S. ____, 103 S.Ct. 692 (1983) 2, 16, 17

Miller v. Milwaukee, 272 U.S. 713 (1927) 16

Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U.S. 313 (1930) 16, 17, 19, 20

New Jersey Realty Title Insurance Co. v. Division of Tax Appeals, 338 U.S. 665 (1950) 16, 17, 18

Northwestern Mutual Life Insurance Co. v. Wisconsin, 275 U.S. 136 (1927) 16

Smith v. Davis, 323 U.S. 111 (1944) 19, 20, 21

Society for Savings v. Bowers, 349 U.S. 143 (1955) 16

United States v. American Building Maintenance Industries, 422 U.S. 271 (1975) 14

United States v. Atlas Life Insurance Co., 381 U.S. 233 (1965) ..... *passim*

Van Allen v. Assessors, 3 Wall. (70 U.S.) 573 (1866) 19

TABLE OF AUTHORITIES (Continued)

Page

Statutes

Rev. Stat. § 3701 (1878), unofficially codified in 1926 as 31 U.S.C. § 742, amended in 1959 by Pub. L. No. 86-346, 73 Stat. 622, reformulated without substantive change as 31 U.S.C. § 3124(a) by Act of September 13, 1982, 96 Stat. 877, 945 ..... *passim*

Life Insurance Company Income Tax Act of 1959, 26 U.S.C. §§ 801-20, Pub. L. No. 86-69, 73 Stat. 112 14

12 U.S.C. § 1433 4

12 U.S.C. § 1717(c)(2) 4

12 U.S.C. § 1825 4

12 U.S.C. § 2055 4

12 U.S.C. § 2079 4

12 U.S.C. § 2134 4

Ga. Code Ann. § 91A-3301 (1980) 7

O.C.G.A. § 45-7-50 (1982) 12

O.C.G.A. § 45-20-55 (Cum. Supp. 1984) 12

Other Authorities

105 Cong. Rec. 8402 15

[1959] U.S. Code Cong. & Ad. News 14

"Public Debt Ceiling and Interest Rate Ceiling on Bonds," Hearings Before the Committee on Ways and Means, House of Representatives, 86th Cong. 1st Sess. (June 10, 11 and 12, 1959) 14

Op. Att'y Gen. (Ga.) 82-79 12

NO. 83-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FIRST NATIONAL BANK OF ATLANTA, etc.,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR APPELLEES

Appellees Bartow County Board of Tax Assessors and Marcus Collins, State Revenue Commissioner of Georgia ("Taxing Authorities"), concur in the Question Presented, Parties, Opinions Below, Jurisdiction and Statutes Involved as presented by Appellant First National Bank of Atlanta, successor in interest to First National Bank of Cartersville, Georgia ("First Atlanta").[1]

[1] The Taxing Authorities submit that the Question Presented in the "Brief by Petitioners in American Bank & Trust Co. v. Dallas County as Amicus Curiae in Support of Appellant" ("Texas Banks' Brief") is inaccurate. The statement of the Question Presented in the Texas Banks' Brief erroneously suggests that Georgia's method does not completely eliminate the value of federal obligations from the value of bank shares.

RESPONSE TO APPELLANT'S STATEMENT OF THE CASE

The Taxing Authorities do not dispute the matters stated in First Atlanta's Statement of the Case, but call to the attention of the Court additional facts which are material to the following statement made in the Brief for the United States as Amicus Curiae Supporting Appellant ("Brief for the United States") 2:

> We are informed by the Department of the Treasury that, as of December 1983, $1,022.6 billion of federal obligations were privately held, of which $188.9 billion were held by commercial banks. To the extent that such obligations are taken into account in the computation of state or local taxes, their marketability is diminished and the cost of borrowing by the United States is enhanced to a significant, if not precisely measurable, extent.

Variations of this statement appear in the Brief for the United States as Amicus Curiae (urging that probable jurisdiction be noted) and in the United States' Motion for Divided Argument. Moreover, similar predictions were offered in the briefs submitted by the United States in recent state bank tax cases involving different issues. *American Bank & Trust Co. v. Dallas County*, 463 U.S. ____, 103 S.Ct. 3369 (1983); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. ____, 103 S.Ct. 692 (1983). The potential importance of such statements is suggested by this Court's specific reliance upon the statement made in the brief filed in *Memphis Bank & Trust Co. v. Garner, supra*. *See* 103 S.Ct. at 697 n.8.

After the Solicitor General predicted that Georgia's method could cost the United States "millions of dollars" in additional borrowing costs, Brief for the United States as Amicus Curiae (urging that probable jurisdiction be noted) 2, counsel for the Taxing Authorities requested any data or analysis which might support this prediction. The Office of the Solicitor General supplied no data or analysis which responded to the issues raised in counsel's letters.[2] The Taxing Authorities submit that the Solicitor General's prediction fails to take into account some of the most important elements of a proper analysis of this issue.

As explained by the Taxing Authorities in their Motion to Dismiss 8-9 n.4, First Atlanta's method offers a share tax benefit to banks which purchase federal obligations only up to the point that the banks' share tax liability is reduced to zero. This is a point that the Solicitor General now concedes. Brief for the United States 15 n.6. Georgia's method, in contrast, offers some share tax benefit for all purchases of federal obligations without limitation. Motion to Dismiss 8-9 n.4. This is a point that the Solicitor General has neither conceded nor disputed.

The Solicitor General states that First Atlanta's method enhances the marketability of federal obligations to banks which have not yet reduced their share taxes to zero. Brief for the United States 15 n.6. This statement is valid but does not support the Solicitor General's prediction absent data showing that so many banks need so many additional federal obligations to reduce their share taxes to zero that the incentive offered to these banks by First Atlanta's method outweighs the incentive offered to all bank share taxpayers by Georgia's method. No such data has been produced.

First Atlanta's Statement of the Case suggests that it had a share value of $557,187 after deduction of its

---

[2] The correspondence between counsel for the Taxing Authorities and the Office of the Solicitor General is reproduced as the Appendix to this Brief.

"Value of U.S. Gov't Securities." Brief of Appellant 4. This appears to support the Solicitor General's prediction, because it suggests that First Atlanta would have gained a share tax benefit from the purchase of an additional $557,187 in federal obligations. The record shows, however, that First Atlanta's deduction of "U.S. Gov't Securities" included only U.S. Treasury securities, and not any of First Atlanta's $4,382,000 in "obligations of other U.S. Government agencies and corporations" ("agency obligations"). J.A. A-7 and A-8. Many agency obligations are exempt from state and local taxation,[3] so it cannot be said that First Atlanta was actually in a position to gain a share tax benefit by holding additional federal obligations. If a few as 13.5% of First Atlanta's agency obligations were exempt, then it is Georgia's method that would enhance the marketability of federal obligations to First Atlanta. Moreover, the record establishes that both of the other banks in the case below held more than enough in exempt federal obligations to reduce their share tax liabilities to zero. R. 15, 27. For these banks, therefore, it is Georgia's method and not First Atlanta's method that enhances the marketability of federal obligations.

The record thus tends not to support the Solicitor General's prediction. Moreover, the Taxing Authorities are aware of no indication outside of the record that significant numbers of banks in share tax states hold so few

[3] *E.g.*, obligations issued by federal home loan banks, *see* 12 U.S.C. § 1433; Mortgage Participation Certificates of the Government National Mortgage Association, *see* 12 U.S.C. § 1717(c)(2); obligations issued by the Federal Deposit Insurance Corporation, *see* 12 U.S.C. § 1825; obligations issued by federal land banks and land bank associations, *see* 12 U.S.C. § 2055; obligations issued by federal intermediate credit banks, *see* 12 U.S.C. § 2079; obligations of banks for cooperatives, *see* 12 U.S.C. § 2134.

federal obligations that they would be encouraged to hold more by First Atlanta's method.[4] Even if it is assumed that more than a few banks in share tax states would be encouraged by First Atlanta's method to hold some more federal securities, there appears to be no indication, inside or outside of the record, that this encouragement would outweigh the encouragement offered by Georgia's method. Accordingly, the Taxing Authorities submit it is inaccurate to state that "[t]he tax here plainly reduces the investment value of federal obligations." Brief for the United States 7.

SUMMARY OF ARGUMENT

As now construed, Georgia's bank share tax statute divides bank assets pro rata between an untaxed account (liabilities) and a taxed account (net worth). All federal obligation values appearing in the taxed account are deducted prior to the levy of the tax. This affirmative and complete exclusion of exempt values from the tax base ensures that no tax at all is levied on exempt values. The state statute complies fully with the requirements of Rev. Stat. § 3701.

Appellant and its supporting *amici curiae* advance an economic analysis which was rejected by this Court in

[4] The Solicitor General quotes nationwide figures, Brief for the United States 2, but it seems clear that this issue affects banks only in the few states which currently impose share taxes. Documents submitted to the Georgia Supreme Court, certified copies of which have been lodged with the Clerk of this Court, show that 48 of 49 claims for refund produced in a survey of Georgia counties were based upon a zero share tax liability. There is some reason to conclude that this pattern holds in other share tax states. *See Dale National Bank v. Commonwealth*, 465 A.2d 965, 966-67 (Pa. 1983) (bank held over $2 million more in federal obligations than amount necessary to reduce share tax to zero); *see also* Brief for the United States as Amicus Curiae in Support of Petition for Certiorari 4 n.4 filed in *American Bank & Trust Co. v. Dallas County*, *supra*.

United States v. Atlas Life Insurance Co., 381 U.S. 233 (1965). Only a failure to understand the nature of net worth can account for the claim that all of the federal obligations held by a bank are included in net worth. In many cases, probably including First Atlanta, it is literally impossible to fit all of the bank's federal obligations into the net worth account. Acting on the advice of the Treasury, Congress in 1959 rejected the economic analysis which is now advanced by First Atlanta and the Solicitor General. There is no basis in the legislative history or in the modern decisions of this Court for condemning the pro rata allocation formula adopted by the court below.

Various predictions have been made about the effect of an affirmance in this case upon government borrowing, upon state tax decisions, and upon bank management. The relevance of these predictions to a proper decision in this case is unclear. Equally unclear is the factual and analytical basis for these predictions. There appears to be no basis for concluding that the method adopted below will have any of the consequences claimed by First Atlanta and its supporting *amici*. There is therefore no reason to strain to strike down a state statute which protects fully the exempt status of federal obligations.

ARGUMENT

A. As Now Construed, The Georgia Bank Share Tax Statute Imposes No Tax at All on Exempt Values.

First Atlanta and its supporting *amici* contend that the "proportionate deduction method" adopted by the Georgia Supreme Court places an indirect state tax burden on exempt federal obligations,[5] but it is now firmly

[5] First Atlanta states that Georgia's method "substantially undercuts the protection of federal obligations from state taxation," and allows states "to determine the extent to which they will tax federal obligations." Brief of Appellant 5, 7. The Solicitor General states that Georgia's method "is a form of taxing federal obligations." Brief for the United States 12. The Texas Banks state that Georgia's method violates federal obligations' "immunity from state taxation." Texas Banks' Brief 7.

established that the method adopted below imposes no tax at all on exempt values. Indeed, the term "proportionate deduction method" is something of a misnomer: while the method calculates the proportion of which federal obligations comprise the gross assets of the bank, the deduction of federal obligation values present in net worth is total, not proportional. Because the tax base under the statute is net worth (minus certain deductions), *see* Ga. Code § 91A-3301 (1980), it is the deduction of values present in net worth that is pertinent here.

The operation of methods like the method adopted below was thoroughly analyzed by this Court in *United States v. Atlas Life Insurance Co.*, 381 U.S. 233 (1965). In *Atlas Life*, a unanimous Court held that pro rata allocation of exempt values between taxed and untaxed accounts, followed by a full deduction of exempt values to the extent they appear in the taxed account, imposes no tax at all upon exempt values. The Court restated with approval the analysis of this issue presented by the government:

> According to the Commissioner, the company's income from investments includes only its pro rata share of tax exempt interest and since this share is fully deductible by the company, the law imposes *no tax at all* on exempt interest. (emphasis supplied) 381 U.S. at 238.

The Solicitor General does not dispute this analysis, but attempts to distinguish the economic position in *Atlas Life* from the economic position in the case at bar, as follows:

> [T]he proration in *Atlas Life* was justified to avoid a double exemption; as explained above, appellant here seeks only to exempt the full value of federal obligations once from the total assets used to calculate net worth. Brief for the United States 16 n.7.

In drawing this distinction, the Solicitor General assumes that Georgia's bank share tax is unlike the life insurance company tax and fails to protect any exempt values from tax when it divides gross assets between liabilities (an untaxed account) and net worth (a taxed account). Accordingly, the Solicitor General states that all of a bank's federal obligations are present in the net worth account:

> [T]he net worth figure that the court below took as the base from which further computation of the bank share tax proceeded included all of the obligations of the United States held by the bank. Brief for the United States 6-7.

No attempt has been made, however, to validate the underlying assumption that the bank share tax, unlike the life insurance company tax, allocates all exempt values to the taxed account.

This assumption is not only unvalidated, it is contradicted by the record, which shows that it is impossible for "all" of First Atlanta's federal obligations to be included in net worth. During the period in issue in this case, First Atlanta's net worth was $5,781,612, J.A. A-3, while its federal obligations (treasury and agency) totaled $8,553,000 J.A. A-8. It is obviously impossible for all of an $8,553,000 account to be included in a $5,781,612 account.[6] The truth of the matter, of course, is that only

[6] As previously noted, some of the $8,553,000 represents agency obligations which may not be exempt. This possibility does not affect the issue, because the Solicitor General's assumption leads to impossible results in many cases. For example, in *Dale National Bank v. Commonwealth*, *supra*, 465 A.2d at 966, the bank held exempt federal obligations with a market value of $5,246,677.50 while its net worth was only $3,921,329.10.

part of the federal obligations are present in net worth. Federal obligations are offset by bank liabilities the same as other bank assets, so only a fraction of federal obligations can be present in net worth. As a matter of proper economic analysis, the position of the Solicitor General is insupportable.

The Taxing Authorities and the Solicitor General agree that a proper economic analysis is essential to an understanding of this case. The Solicitor General asserts that it was the Georgia Supreme Court's failure to understand the nature of net worth that led it into error:

> The fundamental flaw in the decision of the court below is its acceptance of net worth as a given figure, without examining how that figure was obtained. Brief for the United States 6.

It is clear, however, that the Georgia Supreme Court *did* examine how net worth is obtained, *see* J.S. App. A-1 n.1, and utilized its understanding in reaching a proper decision. If First Atlanta and its supporting *amici* practiced what they preached, they would not ask this Court to believe that $8,553,000 can be encompassed in a $5,781,612 account.

Despite the efforts of First Atlanta and the Solicitor General to suggest that the economic analysis of *Atlas Life* does not apply to this case, it is clear that the same analysis governs both cases. The *Atlas Life* Court was correct when it said that the Life Insurance Company Income Tax Act of 1959 imposes "no tax at all" on exempt values, and the Georgia Supreme Court was equally

correct when it said that Georgia's bank share tax statute, as now construed, "fully insulates the federal obligations from the tax." J.S. App. A-5.

Establishing that Georgia imposes no tax at all on exempt values should end this case. Fundamentally, Rev. Stat. § 3701 is an exemption statute and an exemption statute does not condemn a tax which provides for full exemption of protected values.

B. Rev. Stat. § 3701 Only Prohibits State Taxes Which Burden Federal Obligations, And Does Not Require That Federal Obligations Be Allowed To Shelter Non-Exempt Assets from Tax.

The deduction method advanced by First Atlanta typically reduces taxes below the level at which federal obligations are rendered tax free. As the Georgia Supreme Court recognized, this is due to federal obligations sheltering or insulating non-exempt assets from tax. J.S. App. A-3. For Citizens and Southern Bank of Bartow County, the bank used by the Georgia Supreme Court to illustrate its method, First Atlanta's method would permit federal obligations to shelter more than nine times their value in taxable assets. J.S. App. A-7.

First Atlanta and its supporting *amici* never admit that this sheltering takes place, but tacitly endorse it by arguing that First Atlanta's method is mandated by the language and history of Rev. Stat. § 3701 and by the pertinent case law. The Taxing Authorities submit, however, that Georgia's pro rata method is permitted by the language of Rev. Stat. § 3701, effectuates the intent of Congress, and is supported by the decisions of this Court.

1. Georgia's Method is Permitted By the Language of Rev. Stat. § 3701.

Until 1959, Rev. Stat. § 3701 provided simply that federal obligations "shall be exempt from taxation by or under State or municipal or local authority." In 1959, the following language was added to the statute:

> This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax . . . .

The new language extended the exemption, making it apply to certain indirect taxes including bank share taxes. *American Bank & Trust Co. v. Dallas County*, *supra*. First Atlanta concedes that this appeal involves a different issue. This appeal does not ask which state taxes are covered by Rev. Stat. § 3701, but asks what Rev. Stat. § 3701 requires of states with respect to covered taxes. Juris. St. 6.

The principal requirement of Rev. Stat. § 3701 is that federal obligations be exempt. The pre-1959 language expressly provides that federal obligations "shall be exempt," and the 1959 amendment by its terms defines the scope of "[t]his exemption." Giving these words their ordinary meaning, it is clear that methods which impose no tax burden on federal obligations fully comply with this requirement. The method adopted by the Georgia Supreme Court imposes no tax at all on federal obligations.

First Atlanta and its supporting *amici* rely upon the "considered, directly or indirectly, in the computation" language of Rev. Stat. § 3701. Their argument is that federal obligations are not considered if they are deducted to the extent they are present in gross assets, but they are considered if they are deducted to the extent they are present in net assets. According to First Atlanta, only

the former procedure prevents consideration of federal obligations "in computing the tax base." Brief of Appellant 9.

If the test were actually whether federal obligations are considered at any stage in the process of computing the tax base, then First Atlanta's own tax return would be improper, because it considered federal obligations for the purpose of deducting them. J.A. A-4. This is not the test, of course, as Rev. Stat. § 3701 speaks of computing the "tax," not the "tax base." Read carefully, the language of Rev. Stat. § 3701 does not forbid consideration of federal obligations during a preliminary calculation, provided that the federal obligations are removed, affirmatively and completely, from the tax base prior to the point at which the levy is made. This is precisely what Georgia's bank share tax statute does, as the court below explained:

> "The foregoing computation removes from the tax base (net worth) so much of the net worth (tax base) as includes federal securities, thereby excluding, as required by [Rev. Stat. § 3701], such securities from consideration in the computation of the tax. J.S. App. A-8.

Moreover, First Atlanta's interpretation of the language of Rev. Stat. § 3701 leads to absurd results. For example, suppose a state decided to encourage persons to hold U.S. Savings Bonds by granting a $1.00 state income tax credit for each $100 of bonds held at the end of a tax year.[1] Such a credit would not tax U.S. Savings Bonds, and in fact would subsidize government borrowing, but it would be invalid under First Atlanta's proposed test because income taxes could not be computed without considering federal obligation values. Such absurdities do not occur under the Georgia Supreme Court's reading of Rev. Stat. § 3701. The pro rata method removes all federal obligations from the bank share tax base before the levy is made, so the Georgia statute as now construed fully complies with the terms of Rev. Stat. § 3701.

[1] State support of federal borrowing exists in fact. Georgia expends resources to encourage State employees to invest in U.S. Savings Bonds by administering a program of voluntary payroll deductions for this purpose. O.C.G.A. § 45-7-30. Payroll deductions for charity are also authorized, but the State is reimbursed for its expenses by the charities, see O.C.G.A. §45-20-55 (Cum. Supp. 1984), as required by the State Constitution. See Op. Att'y Gen. (Ga.) 82-79.

2. Georgia's Method Effectuates the Intent of Congress.

The intent of Congress in amending Rev. Stat. § 3701 was to end indirect state taxation of federal obligations, except by the methods specified in the statute. *American Bank & Trust Co. v. Dallas County, supra*, 103 S.Ct. at 3377. First Atlanta characterizes the indications from the legislative history, as follows:

> The pertinent committee reports show that those who drafted and approved the 1959 amendment intended that federal obligation components be completely eliminated from state tax bases, including the residual type tax base at issue here. Brief of Appellant 6.

First Atlanta and its supporting *amici* do not, however, point to anything in the legislative history to indicate that pro rata methods fail to comply with such an intent. The Taxing Authorities submit that the legislative history of the 1959 amendment to Rev. Stat. § 3701 contains nothing which suggests that pro rata methods fail to eliminate federal obligations components completely from net worth prior to the levy of a tax.

Even though the legislative reports and other materi-

als dealing with Rev. Stat. § 3701 do not address the issue raised by this case, there is a convincing indication that those who drafted and approved the 1959 amendment considered that pro rata methods would protect completely the exempt status of federal obligations. As this Court recognized in *United States v. American Building Maintenance Industries*, 422 U.S. 271, 277 (1975), when the same Congress enacts two laws designed to deal with closely related aspects of the same problem, Congress' decision with respect to one law is particularly relevant to a proper interpretation of the other law.

Both the amendment to Rev. Stat. § 3701 and the Life Insurance Company Income Tax Act of 1959 involve the tax treatment of persons holding exempt securities. The two pieces of legislation were under consideration at the same time or at almost exactly the same time: the Conference Report on the Life Insurance Company Income Tax Act is dated June 9, 1959, *see* [1959] U.S. Code Cong. & Ad. News 1575, only one day before hearings were held on the bill which amended Rev. Stat. § 3701. *See* "Public Debt Ceiling and Interest Rate Ceiling on Bonds," Hearings before the Committee on Ways and Means, House of Representatives, 86th Cong., 1st Sess. (June 10, 11, and 12, 1959) 69-72. Congress' findings and intent respecting pro rata allocation methods in the context of life insurance company taxation should therefore be highly relevant to understanding the status of pro rata allocation methods under Rev. Stat. § 3701.

As noted by this Court in *Atlas Life, supra*, 381 U.S. at 242 n.13, Representative Mills, Chairman of the House Ways and Means Committee, explained to the House that the life insurance company tax legislation, "[a]s agreed to by the conferees," gave appropriate protection

to exempt values. With respect to the kind of protection that the legislation's pro rata method was intended to provide to exempt values, Senator Byrd, the Senate Committee Chair, made it clear that the intent of his committee was "not to impose any tax on tax exempt interest." 381 U.S. at 242. The position of Senator Byrd, which was supported by the Department of the Treasury, was that the life insurance company tax statute's pro rata method would accomplish Congress' goal of placing no tax burden on exempt interest. 381 U.S. at 241 n.12.

First Atlanta argues that these same legislators, acting at exactly or almost exactly the same time, concluded that states must be barred from employing pro rata methods because pro rata methods fail to remove exempt federal obligation components from state tax bases. Brief of Appellant 14. The Taxing Authorities submit that such a stunning change in position may not be attributed to Congress absent the clearest indications from the legislative history concerning Rev. Stat. § 3701. There being no indication that pro rata methods were disapproved when Rev. Stat. § 3701 was amended,[8] there is no reason to doubt that the pro rata method currently employed by Georgia complies fully with the intent of Congress.

[8] First Atlanta reads the Treasury's criticism of Idaho's income tax as condemning pro rata methods, Brief of Appellant 14-15, but the Taxing Authorities submit that this is plainly not so. The Treasury's goal was to "clarify the exemption by expressly exempting Federal obligations and the interest on them from every form of State and local taxation." Brief of Appellant 14 (quoting Hearings at 71). While such a clarification would require Idaho to alter its income tax (Idaho did not use a pro rata method and conceded that it was imposing an indirect tax burden on federal obligations), it would have no effect on state taxes which imposed no tax burden upon federal obligations. The Treasury Department could hardly advise Congress that pro rata methods would burden exempt values, since it had advised Congress the opposite on May 18, 1959, less than a month before. *See* 105 Cong. Rec. 8402.

3. Georgia's Method is Supported by the Decisions of this Court.

United States v. Atlas Life Insurance Co., supra, the case which authoritatively analyzed the economic effect of taxes like the Georgia bank share tax, is also pivotal to understanding the legal status of such taxes under Rev. Stat. § 3701. First Atlanta and the Solicitor General devote considerable space to their argument that *Atlas Life* does not control this case because *Atlas Life* involved constitutional immunity rather than Rev. Stat. § 3701.[9]

However, this Court on several occasions has had the opportunity to consider whether the constitutional standard differs from the Rev. Stat. § 3701 standard, and in no case identified an actual difference. *See Miller v. Milwaukee*, 272 U.S. 713 (1927); *Northwestern Mutual Life Insurance Co. v. Wisconsin*, 275 U.S. 136 (1927); *Missouri ex rel. Missouri Insurance Co. v. Gehner*, 281 U.S. 313 (1930); *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665 (1950); *Society for Savings v. Bowers*, 349 U.S. 143 (1955); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. ____, 103 S.Ct. 692 (1983). Moreover, in cases involving both the pre-1959 and post-1959 versions of Rev. Stat. § 3701, this Court has commented upon the relationship between the Constitution and Rev. Stat. § 3701 and stated that the statutory standard is the same as the constitutional standard. In *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals, supra*, and *Society for Savings v. Bowers, supra* at 144, both decided prior to 1959, this matter was addressed by this Court. In both cases the two standards were equated,

[9] Brief of Appellant 6-7, 12-13 n. 11, 16-18; Brief for the United States 16 n.7. *Atlas Life* noted in a dictum that the constitutional standard could differ from the statutory standard. *See* 381 U.S. at 245 n. 16.

New Jersey Realty Title putting the matter as follows:

> [W]e take as guides to our application of Rev. Stat. § 3701 the decisions of this Court on the related constitutional question of immunity in *Bank of Commerce v. New York City*, 2 Black 620 (1863), and the *Bank Tax Case*, 2 Wall. 200 (1865) . . . . 338 U.S. at 672.

In *Memphis Bank & Trust Co. v. Garner, supra*, decided in 1983, the following was stated:

> We have not previously had occasion to determine whether a state or local tax is "nondiscriminatory" within the meaning of [Rev. Stat. § 3701]. However, we have frequently considered this concept in our decisions concerning the constitutional immunity of federal government property, including bonds and other securities, from taxation by the States. *Our decisions have treated [Rev. Stat. § 3701] as principally a restatement of the constitutional rule.* See, e.g., New Jersey Realty Title Ins. Co. v. Division of Tax Appeals, 338 U.S. 665, 672, 94 L.ed. 439, 70 S.Ct. 413 (1950); Missouri Ins. Co. v. Gehner, 281 U.S. 313, 321-22, 764 L.Ed. 870, 50 S. Ct. 326 (1930). (emphasis supplied) 103 S.Ct. at 696.

Despite the Taxing Authorities' previous reliance on this line of authority, Motion to Dismiss 10-11, neither First Atlanta nor the Solicitor General nor the Texas Banks address this issue or show any reason why the constitutional analysis of *Atlas Life* does not apply to Rev. Stat. § 3701.

First Atlanta and its supporting *amici* do cite other of this Court's decisions, but the Taxing Authorities submit that none supports a reversal of the judgment below. Several cases are said to disapprove of pro rata allocations, but most did not involve pro rata methods and so cannot properly be read to disapprove of methods like

the method approved below. The heaviest reliance is placed upon *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals, supra,* a net worth tax case in which this Court is said to have held "that the amount on which the tax was computed was required to be reduced by the amount of obligations of the United States owned by the corporation." Brief for the United States 13. *See also* Brief of Appellant 11, 12, 14, 15, 22 and Brief for the United States 7, 14. This is not so. The issue in this Court was not whether a company was entitled to deduct federal obligations in the manner advanced by First Atlanta, but whether it could be taxed under a proviso which made no allowance at all for federal obligations. Disapproval of an assessment rendered under such a proviso says nothing about the propriety of a pro rata method Indeed, this Court expressly declined to decide whether the assessment actually imposed a burden on federal obligations, because while such an issue was presented by the facts in the record it had not been raised by the taxing authority or ruled upon by the state courts. *See* 338 U.S. at 670-71 n.5.

The Solicitor General's characterization of the holding of this case is probably attributable to the fact that another part of the State statute allowed a deduction similar to that advanced by First Atlanta. *See* 338 U.S. at 668-69. It is clear, however, that a state legislative decision does not determine the meaning of Rev. Stat. § 3701. It follows that *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals* does not support the notion that pro rata methods violate Rev. Stat. § 3701.

Similarly, in *Bank of Commerce v. New York City,* 2 Black (67 U.S.) 620 (1863), and *Bank Tax Case,* 2 Wall. (69 U.S.) 200, 207 (1865), pro rata methods were not in

issue. Moreover, since these cases involved the Constitution rather than a statute, if anything in them had arguably disapproved of pro rata methods it would have been repudiated directly by *Atlas Life.* These cases are also factually inapposite.[10]

It is remarkable that First Atlanta and its supporting *amici* place so little reliance upon *Missouri ex rel. Missouri Insurance Co. v. Gehner, supra,* the one case that considered the propriety of a pro rata method under Rev. Stat. § 3701. First Atlanta relegates *Missouri v. Gehner* to a footnote, Brief of Appellant 12-13, n.11, and neither the Solicitor General nor the Texas Banks mention *Missouri v. Gehner* at all. Evidently they regard the reasoning of the majority in *Missouri v. Gehner* as indefensible, because if the case's construction of Rev. Stat. § 3701 is still good law it absolutely controls the case at bar. The Taxing Authorities submit *Missouri v. Gehner* is not good law, and that Justice Stone, writing in dissent for himself and Justices Holmes and Brandeis, held the better reasoned position in the case. *See* 281 U.S. at 322-31 (Stone, J., dissenting).

Justice Stone's dissent not only presaged the analysis of this Court in *Atlas Life,* it provides perhaps the definitive answer to the attempt in this case to suggest that Georgia's method is prohibited by *Smith v. Davis,* 323 U.S. 111 (1944). *See* Brief of Appellant 7, 22 n.21; Brief

---

[10] Civil War era banks typically invested their entire capital in exempt assets, *see* 2 Wall. (69 U.S.) at 206; 2 Black (67 U.S.) at 620-21; *see also Van Allen v. Assessors,* 3 Wall. (70 U.S.) 573, 582 (1866), because heavy investments in federal obligations maximized a bank's ability to issue currency. *See* 2 Wall. (69 U.S.) at 208; 3 Wall. (70 U.S.) at 582. If all of a bank's assets are exempt then First Atlanta's method and Georgia's method both produce a zero tax liability. It follows that the propriety of a pro rata method could not possibly be in issue in these cases.

for the United States 15. *Smith v. Davis* declared Congress' intent "to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." 323 U.S. at 117. Since *Atlas Life* forecloses any suggestion that Georgia is imposing a tax burden on federal obligations, the complaint here must be that Georgia's method fails to subsidize federal borrowing to the same degree as First Atlanta's method. Naturally, state subsidization of federal borrowing could enhance the marketability of federal obligations and therefore a failure to furnish subsidies could be viewed as diminishing the investment attractiveness of federal obligations.[11]

However, neither *Smith v. Davis* nor any other case known to the Taxing Authorities stands for the proposition that states have an affirmative duty, under either the Constitution or Rev. Stat. § 3701, to subsidize federal borrowing by allowing federal obligations to shelter non-exempt assets from tax. The majority in *Missouri v. Gehner* misanalyzed the effect of the state statute and did not realize that it was allowing federal obligations to shelter non-exempt assets from tax, but Justice Stone understood the thrust of the argument that is now advanced by First Atlanta:

> If the constitutional inhibition is not directed against the imposition of burdens, but affirmatively compels the annexation of such benefits to the ownership of government bonds as will increase their currency and stimulate the market for them, . . . it is difficult

[11] As discussed earlier, supra pp. 2-5, the idea that Georgia's method will actually impair federal borrowing is based on an incomplete analysis and has not been supported by facts inside or outside of the record.

> to see what the limits of such a doctrine may be. 281 U.S. at 330-31.

To say that Georgia's method "hinders" federal borrowing because another more favorable method can be imagined proves too much, because there is no end to the ways that states could conceivably be asked to subsidize or otherwise encourage the sale of federal obligations. Nothing in *Smith v. Davis*, a case which sustained a state tax against the claim that it burdened federal obligations, supports the rule for which First Atlanta and the Solicitor General say the case stands.

C. Affirming The Judgment Below Will Not Lead To Arbitrary Action by States or Make Bank Investment Decisions More Uncertain.

First Atlanta and its supporting *amici* argue that affirming the judgment below will lead to arbitrary action by states, because different pro rata allocation methods have been advanced by different taxing authorities. Brief of Appellant 18-22; Brief of the United States 13; Texas Banks' Brief 4-7. The Taxing Authorities are not familiar with the supposedly numerous methods being advanced in other states, and fail in any event to see what those methods could have to do with a proper decision in the case at bar.

The central issue in the case at bar is one of principle. Under Rev. Stat. § 3701 it is proper for a state to allocate federal securities pro rata between untaxed and taxed accounts, and then, prior to the levy of the tax, to deduct all federal liabilities which appear in the taxed account. As long as the method adopted by the Georgia Supreme Court conforms to this principle, it is irrelevant that other states are said to have advanced other methods.

It is unrealistic for First Atlanta to claim that an

affirmance of the court below will "open the door to any number of other arbitrary methods." Brief of Appellant 21. The simple and unambiguous nature of the principle governing this case should make it easy to determine whether or not any particular method is permissible. And, as long as a state's method conforms to the United States Constitution and Rev. Stat. § 3701, no federal question is presented by the fact that another state may adopt a different method.

Finally, First Atlanta states that Georgia's method will make bank investment decisions more uncertain, because the after-tax yield on a federal obligation may vary according to the state of a bank's balance sheet at a later date. Brief of Appellant 22 n.21. Given that such variations presumptively would favor federal investments half of the time, it is difficult to see how preventing this effect could even arguably be a goal of R.S. § 3701. In any event, adopting First Atlanta's method will not make investment decisions more certain, because federal obligations compete with other investments, all of whose values are subject to change without notice. It follows that the relative attractiveness of federal obligations will always be uncertain under both First Atlanta's method and Georgia's method.

Even if the matter could be limited to after-tax yields, First Atlanta neglects to consider the effect of other taxes, particularly federal income taxes, and the effect of the First Atlanta method on the after share tax yield of competing taxable investments. Until share taxes are reduced to zero, First Atlanta's method alters the after-tax yield of competing investments far more drastically than Georgia's method. It is therefore an open question which method would simplify the work of bank investment managers.

Like the Solicitor General's prediction concerning the effect of this case on federal borrowing, First Atlanta's claim that Georgia's method will materially complicate bank investment decisions is based upon an incomplete analysis. Neither argument offers any reason to condemn a state statute which clearly imposes no tax at all on exempt federal obligations.

CONCLUSION

For the reasons stated, the Taxing Authorities urge the Court to affirm the judgment of the Supreme Court of Georgia.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General of Georgia

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

H. PERRY MICHAEL
First Assistant
Attorney General

VERLEY J. SPIVEY
Senior Assistant
Attorney General

G. CAREY NELSON
Counsel for Appellee
Bartow County Board of
Tax Assessors

COUNSEL OF RECORD:

JAMES C. PRATT
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
Telephone: (404) 656-4168

JAMES C. PRATT
Assistant Attorney General
Counsel for Appellee
Marcus E. Collins, Sr.,
as State Revenue
Commissioner of Georgia

CERTIFICATE OF SERVICE

This is to certify that I have this day served the foregoing Brief for Appellees upon counsel for the opposing party and all *amici curiae* known to Appellees, pursuant to Rule 28(3) of the Rules of the Supreme Court of the United States, by mailing three copies to each in envelopes addressed to:

Lee Trammel Newton, Jr., Esq.
Hansell & Post
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
Counsel for Appellant

Honorable Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530
Counsel for Amicus Curiae The United States

Marvin S. Sloman, Esq.
Carrington, Coleman, Sloman & Blumenthal
2500 South Tower
Plaza of the Americas
Dallas, Texas 75201
Counsel for Amici Curiae American Bank & Trust Co., et al.

John L. Coalson, Jr., Esq.
Alston & Bird
1200 C & S National Bank Building
35 Broad Street
Atlanta, Georgia 30335
Counsel for Amicus Curiae Citizens and Southern National Bank

Earl Luna, Esq.
Randel B. Gibbs, Esq.
Law Offices of Earl Luna, P.C.
2416 LTV Tower
Dallas, Texas 75201
Counsel for Amici Curiae Dallas County, et al.

Tim Kirk, Esq.
Attorney at Law
1200 Republic Bank Building
Dallas, Texas 75201
Counsel for Amici Curiae Dallas County Appraisal District, et al.

John W. Edmonds, III, Esq.
Mays, Valentine, Davenport & Moore
P.O. Box 1122
Richmond, Virginia 23208
Counsel for Amicus Curiae Virginia Bankers Association

John J. Brennan, Esq.
Dechert, Price & Rhodes
3400 Centre Square West
1500 Market Street
Philadelphia, Pennsylvania 19102
Counsel for Amicus Curiae Pennsylvania Bankers Association

George T. Bell, Esq.
Chief Counsel, Pennsylvania Department of Revenue
11th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
Counsel for Amicus Curiae Commonwealth of Pennsylvania

with first class postage prepaid. All parties required to be served have been served.

This ____ day of _____, 1984.

JAMES C. PRATT
Assistant Attorney General

132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4168

APPENDIX

THE DEPARTMENT OF LAW
STATE OF GEORGIA
ATLANTA

May 10, 1984

Mr. John Garvey
Office of the Solicitor General
Department of Justice
Washington, D.C. 20530

Re: First National Bank of Atlanta, etc. v. Bartow County Board of Tax Assessors, et al., No. 831620 (Appeal Docketed April 3, 1984)

Dear Mr. Garvey:

This will confirm our telephone conversation of May 7, 1984. When I called, I had just received a copy of the Brief for the United States as Amicus Curiae in the referenced case, and called the office of the Solicitor General to inquire about the statements on page 2 that "The Georgia Supreme Court's decision adds to the cost of borrowing by the United States" and that, under stated conditions, the additional costs "could amount to millions of dollars." I was referred to you and appreciated your willingness to raise this matter within your office, although you were careful to make no commitment.

We are sure that when those statements were made they were thought to be accurate and informative. However, statements of this nature necessarily involve a number of assumptions, some of which may be very much open to question. Therefore, we would appreciate receiving a copy of the analysis upon which these statements were made.

Related representations were made in briefs filed in *Memphis Bank & Trust Co. v. Garner*, 459 U.S. ____ (1983) and *American Bank & Trust Co. v. Dallas County*, 463 U.S. ____ (1983). If the statements made in the pending case were based wholly or in part upon analyses previously prepared in connection with these earlier cases, we would appreciate copies of those analyses as well. In the event that no written analysis has been prepared, we would appreciate receiving a description, in as much detail as possible, of how the matter was approached, what assumptions were made, and what sources of information were used.

We appreciate that your office is very busy, but believe that this is a matter of considerable importance. We note that the Court, in *Memphis Bank & Trust Co. v. Garner* at footnote 8, made specific reference to the alleged impact of that case upon the Treasury. We look forward to cooperating with your office to ensure that the Court receives a fair and accurate picture of the issues raised by the pending case.

Very truly yours,

/s/ JAMES C. PRATT

JAMES C. PRATT
Assistant Attorney General

JCP:ds

cc: Mr. Lee Trammell Newton, Jr.
Mr. G. Carey Nelson
Mr. Marvin S. Sloman

U.S. DEPARTMENT OF JUSTICE
Office of the Solicitor General

Washington, D.C. 20530

May 17, 1984

James C. Pratt
Assistant Attorney General
The Department of Law
State of Georgia
Atlanta, Georgia 30334

Dear Mr. Pratt:

Thank you for your letter of May 10, 1984 concerning the government's brief in *First National Bank of Atlanta* v. *Bartow County Board of Tax Assessors*, No. 83-1620. As you know, the effect that state taxation will have on the cost of borrowing by the United States is not a subject that admits of mathematical demonstration. State taxes and tax rates vary, so that the best one can come up with is an estimate based on a composite. We think there can be no doubt, however, that the extent of exemption from taxation affects the interest rate necessary to market government bonds. Even if one confines one's attention to the $189 billion in federal obligations held by commercial banks (see note 1 of our brief), a fluctuation in the interest rate of one one-thousandth of 1% would mean an added cost to the federal government of $1.89 million per year. Such an assumption about the effect on interest rates is no doubt conservative, but fully justifies the assertion in our brief that "a tax on banks or other corporate shares similar to that upheld in this case" would impose on the United States "additional

costs of borrowing that could amount to millions of dollars."

In offering our views of the impact that the Georgia Supreme Court's decision would have, we of course consulted with attorneys in the Tax Division of the Department of Justice, and in the Department of the Treasury, whose views on these matters are more expert than ours.

Sincerely,

/s/ REX E. LEE
Rex E. Lee
Solicitor General

cc: (see attached list)

No. 83-1620

COUNSEL:

Charles T. Zink, Esquire
Lee Trammell Newton Jr., Esquire
Hansell & Post
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101

Charles W. McGrady, Esquire
The First National Bank of Atlanta
Post Office Box 4148
Atlanta, Georgia 30302

G. Carey Nelson, Esquire
Nelson & Bradley
Post Office Box 362
Cartersville, Georgia 30120

THE DEPARTMENT OF LAW
STATE OF GEORGIA
ATLANTA

May 29, 1984

Hon. Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

Re: *First National Bank of Atlanta, etc. v. Bartow County Board of Tax Assessors, et al.*, No. 83-1620 (appeal docketed April 3, 1984)

Dear Mr. Solicitor General:

Thank you for your letter of May 17, 1984, responding to my letter of May 10. We very much appreciate your taking time to amplify the assertions in your brief concerning the possible impact on government borrowing of the method adopted by the Georgia Supreme Court. However, while the amplification provided was helpful, it does not resolve our concerns.

One of our bases for doubt in this area is explained in our Motion to Dismiss at 8-9, n. 4. You may not have a copy of our Motion, as we did not know of your intention to participate in the case until after our Motion was filed. A copy is enclosed. Our analysis, we think, raises real doubt about the idea that the Georgia Supreme Court's method is less favorable to government borrowing than the method proposed by First Atlanta.

Moreover, your brief's "millions of dollars" quantification of possible government loss states that it is based on the assumption that other states might adopt the Georgia Supreme Court's method for taxing banks or other

corporate shares. In predicting the behavior of other states, however, the relevant comparison is between their current methods and the Georgia Supreme Court's method. A majority of states impose franchise taxes on banks and therefore are free to "reach the value of federal obligations," *American Bank & Trust Co. v. Dallas County*, 463 U.S. ____ (1983) (slip. op. at 17), whereas the Georgia Supreme Court's method imposes "no tax at all" on federal obligations. *United States v. Atlas Life Insurance Company*, 381 U.S. 233, 238 (1965). If these states are impressed by the difference between First Atlanta's method and the Georgia Supreme Court's method and shift from franchise taxes to share taxes, the overall state tax burden on federal borrowing will decrease.

Not having seen the analysis underlying your assertions, or knowing the approach followed by your consultants in the Tax Division of the Department of Justice and in the Department of the Treasury, we do not know if the considerations stated above, and possibly other relevant matters, were taken into account. Accordingly, we again request that the analysis be furnished to us. In the event that no formal written analysis was prepared, we would appreciate receiving a description, in complete detail if possible, of how the matter was approached, what assumptions were made, and what sources of information were used. We appreciate your assistance and look forward to cooperating with you to ensure that the Court receives the most accurate possible information in this proceeding.

Very truly yours,

/s/ JAMES C. PRATT
JAMES C. PRATT
Assistant Attorney General

JCP:ds

Enclosure

cc: Mr. Lee Trammell Newton, Jr.
Mr. G. Carey Nelson
Mr. Marvin S. Sloman
(without enclosure)

REPLY

BRIEF

No. 83-1620

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STRICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

REPLY BRIEF OF APPELLANT

CHARLES T. ZINK
L. TRAMMELL NEWTON, JR.*
*Counsel of Record
HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
(404) 581-8000

October 23, 1984

QUESTION PRESENTED

Whether Rev. Stat. § 3701, which forbids "every form of [state] taxation that would require that . . . [federal] obligations . . . be considered, directly or indirectly, in the computation of the tax," is violated by a state bank share tax measured by a bank's net worth *(i.e.,* its assets, including federal obligations in full, less its liabilities) minus only a proportion of the federal obligations held as assets by the bank?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iii

Reply Brief of Appellant 1

I. The Taxing Authorities Fail To Offer Any Specific Meaning For the Plain Words of Rev. Stat. § 3701 That Would Support Their Position 1

II. Congress Meant For Federal Obligations To Be Omitted From Consideration By Leaving Them Completely Out of the Computation of the Tax 2

III. The Prohibitive Sweep of Rev. Stat. § 3701 Is Broader Than That of the Constitution 5

IV. The Atlas Life Case Has No Bearing on How Rev. Stat. § 3701 Should Be Construed 6

V. The Legislative History of the Life Insurance Company Income Tax Act of 1959 Is Not Relevant To the Interpretation of Rev. Stat. § 3701 7

VI. The Taxing Authorities' Arguments Should Be Addressed To Congress, Not the Court ... 9

Conclusion 12

TABLE OF AUTHORITIES

Cases

	Page
Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 104 S.Ct. 291 (1983)	2, 11
American Bank & Trust Co. v. Dallas County, 103 S.Ct. 3369 (1983)	Passim
Badaracco v. Commissioner of Internal Revenue, 104 S.Ct. 756 (1984)	9
Continental Illinois Bank & Trust Co. v. Lenckos, 102 Ill. 2d. 210, 464 N.E. 2d 1064, *cert. denied*, 53 U.S.L.W. 3285 (Oct. 16, 1984)	3
Des Moines National Bank v. Fairweather, 263 U.S. 103 (1923)	3
Griffin v. Oceanic Contractors, Inc., 102 S.Ct. 3245 (1982)	9
Memphis Bank & Trust Co. v. Garner, 103 S.Ct. 692 (1983)	5-6
United States v. American Building Maintenance Industries, 422 U.S. 271 (1975)	7-8
United States v. Atlas Life Ins. Co., 381 U.S. 233 (1965)	6
Van Allen v. Assessors, 70 U.S. (3 Wall.) 573 (1866)	3

TABLE OF AUTHORITIES — (Continued)

	Page
Statutes	
Clayton Act, § 7, 38 Stat. 731, as amended (codified at 15 U.S.C. § 18)	7
Federal Trade Commission Act, § 5, 38 Stat. 719, as amended (codified at 15 U.S.C. § 45)	7
Life Insurance Company Income Tax Act of 1959, 73 Stat. 112 (codified at 26 U.S.C. §§ 801-20)	6, 7-9
Rev. Stat. § 3701	passim
Other Authorities	
American Heritage Dictionary of the English Language (1970)	3
Hearings on Public Debt Ceiling and Interest Rate Ceiling on Bonds Before the House Committee on Ways and Means, 86th Cong., 1st Sess. (1959)	3, 7
Oxford English Dictionary (1961)	3
S. Rep. No. 291, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 1575	8
S. Rep. No. 909, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 2769	4
Webster's Third New International Dictionary of the English Language Unabridged (1976)	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE FIRST NATIONAL BANK OF ATLANTA
as successor in interest to
FIRST NATIONAL BANK OF CARTERSVILLE, GEORGIA,
Appellant,

v.

BARTOW COUNTY BOARD OF TAX ASSESSORS
and MARCUS COLLINS
as successor in interest to
W. E. STEICKLAND, STATE REVENUE COMMISSIONER,
Appellees.

On Appeal From The
Supreme Court of Georgia

REPLY BRIEF OF APPELLANT

Appellant submits this brief in reply to the arguments advanced by the appellees and their supporting amici.

I. The Taxing Authorities Fail To Offer Any Specific Meaning For the Plain Words of Rev. Stat. § 3701 That Would Support Their Position.

Rev. Stat. § 3701 provides that the exemption for federal obligations from state or local taxation:

> . . . extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax. . . .

The Court concluded in *American Bank & Trust Co. v. Dallas County,* 103 S.Ct. 3369 (1983), that "[u]nder the plain language of the 1959 amendment [to Rev. Stat. § 3701], . . . [a] tax is barred regardless of its *form* if federal obligations must be considered, either directly or indirectly, in *computing* the tax." *Id.* at 3374. (Emphasis in original). The Court held that the word "considered" meant "taken into account or included in the accounting." *Id.*

The appellee taxing authorities do not articulate any specific definition for "considered" different from that determined by *American Bank* ("taken into account or included in the accounting"). In the absence of any alternative definition for "considered" that would require a different result, the plain language of Rev. Stat. § 3701 should be held to forbid the tax computed by the Supreme Court of Georgia.[1] *See Aloha Airlines, Inc. v. Director of Taxation of Hawaii,* 104 S.Ct. 291, 294 (1983) ("when a federal statute unambiguously forbids the States to impose a particular kind of tax . . ., courts need not look beyond the plain language of the federal statute. . . .").

II. Congress Meant For Federal Obligations To Be Omitted From Consideration By Leaving Them Completely Out of the Computation of the Tax.

The appellee taxing authorities argue that complete exclusion of federal obligations could not be what Rev. Stat. § 3701 requires because such exclusion is itself a form of "consideration."

---

[1] If any amount of federal obligations were contributed to the capital of appellant, its bank share tax, under the taxing statute as construed below, would increase. It cannot be plausibly argued, then, that the obligations are not "considered, either directly or indirectly, in the computation of the tax."

As held in *American Bank,* "considered" means "included in the accounting." 103 S.Ct. at 3374. The opposite of to "include in the accounting" is to exclude from the accounting. To "exclude" means "to bar from . . . consideration, or inclusion" (Webster's Third New International Dictionary of the English Language Unabridged 793 (1976)), or "to omit . . . considering; leave out; disregard" (The American Heritage Dictionary of the English Language 458 (1970)). *Accord,* Oxford English Dictionary 382-83 (1961). Excluding federal obligations from gross assets at the outset is the only method consistent with Congress' goal of not "considering" federal obligations because it is the only method that leaves them out of the computation.[2]

This particular application of the statute is confirmed by the legislative history of the 1959 amendment to Rev. Stat. § 3701. The Secretary of the Treasury had objected to "the *inclusion* of interest on obligations of the United States in computing gross income (from which taxable net income is determined."[3] Similarly, the Senate Finance

---

[2] *See Continental Illinois National Bank and Trust Co. v. Lenckos,* 102 Ill.2d 210, 464 N.E.2d 1064, *cert. denied,* 53 U.S.L.W. 3285 (Oct. 16, 1984) (No. 84-306), which the Court recently declined to review. There the Supreme Court of Illinois held that including interest in federal obligations in an apportionment formula caused "consideration" thereof in violation of Rev. Stat. § 3701. *Cf. Des Moines National Bank v. Fairweather,* 263 U.S. 103, 116 (1923), upholding a share tax under the now displaced rule of *Van Allen v. Assessors,* 70 U.S. (3 Wall.) 573 (1866), and observing that "there was no authority for taxing [federal obligations] to the bank, but only for taking [federal obligations] into account in valuing the shares of the stockholders."

[3] Hearings on Public Debt Ceiling and Interest Rate Ceiling on Bonds Before the House Committee on Ways and Means, 86th Cong., 1st Sess. at 70 (1959) (hereinafter "Hearings"). (Emphasis added).

Committee was concerned that "one State has taken the position that the statute as now worded does not prohibit a State from *including* interest on Federal obligations in computing 'gross income' upon which taxable net income is determined."[4] The solution they both envisioned was the exclusion of federal obligation income from gross income before calculation of the residual, net income tax base.[5] The exclusion of federal obligations from gross assets before calculation of the residual net asset tax base is the only way to accomplish the equivalent result in the case at bar.[6]

---

[4] S. Rep. No. 909, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 2769, 2773. (Emphasis added).

[5] The same legislative history also refutes appellees' unsupported argument that because "Rev. Stat. § 3701 speaks of computing the 'tax,' not the 'tax base,' . . . [it] does not forbid consideration of federal obligations during a preliminary calculation. . . ." Brief for Appellees, at 12. Just as the failure to exclude federal obligation income during the "preliminary" calculation of the net income tax base would have made Idaho's income tax invalid in the view of the proponents of the 1959 amendment, the failure of the Georgia bank share tax to exclude federal obligations during the "preliminary" calculation of the net asset tax base makes the share tax invalid. Neither the statute nor its legislative history limit the proscribed "consideration" to any particular phase of the determination of the amount payable.

[6] The appellee taxing authorities unnecessarily overstate appellant's argument when they suggest that appellant's interpretation of the statute would forbid the conferral of a $1 state tax credit for each $100 in savings bonds held by a state taxpayer. Such a provision would not result at all in the inclusion of federal obligations in determining the extent of a tax burden; on the contrary, the provision would use federal obligations to reduce the tax burden beyond the reduction already required by Rev. Stat. § 3701.

III. The Prohibitive Sweep of Rev. Stat. § 3701 Is Broader Than That of the Constitution.

The appellee taxing authorities also argue that Rev. Stat. § 3701, even as amended in 1959, represents no more than a restatement of the constitutional rule against state taxation of federal debt. Brief for Appellees, at 16-17. The Court's decision in *American Bank* demonstrates, however, that Rev. Stat. § 3701 states a broader prohibition than that which may be implied from the Constitution.

In *American Bank*, the Court recognized that:

> By expressly exempting franchise and estate and inheritance taxes from the amended § 3701, Congress manifested its awareness that the new language would broaden significantly the prohibition as it had been construed by the courts.

103 S.Ct. at 3375. *American Bank* was not decided under the constitutional rule; the Texas bank share tax would have been approved under that rule. The disapproval of that tax can only be accounted for by the fact that the statutory prohibition was found to be broader than the implied constitutional prohibition.

Appellees argue that *Memphis Bank & Trust Co. v. Garner*, 103 S.Ct. 692 (1983), suggests a different conclusion. Brief for Appellees, at 16-17. There the Court observed in passing that "[o]ur decisions have treated [Rev. Stat. § 3701] as principally a restatement of the constitutional rule." *Id.* at 696. In so stating, the Court referred only to cases decided prior to the 1959 amendment to Rev. Stat. § 3701; the observation was not, as appellees apparently urge, directed to the 1959 amendment. *Memphis Bank* was concerned only with the meaning of the statutory exception for "nondiscriminatory" franchise taxes, and its only hold-

ing was that the meaning of "nondiscriminatory" in the statutory exception could be determined by reference to pre-1959 case law. *Id.* at 698. As *American Bank* made plain six months later, *Memphis Bank* by no means foreclosed a holding that the statutory language at issue in this case is broader in its proscriptive sweep than the constitutional rule.

IV. The Atlas Life Case Has No Bearing on How Rev. Stat. § 3701 Should Be Construed.

The constitutional inquiry made in *United States* v. *Atlas Life Ins. Co.*, 381 U.S. 233 (1965), into whether the Life Insurance Company Income Tax Act of 1959[7] "place[d] an impermissible tax *on* the interest earned by life insurance companies from municipal bonds" (381 U.S. at 236, emphasis added) is irrelevant here.

Notwithstanding the Court's express holding in *American Bank* that "the [1959] amendment [to Rev. Stat. § 3701] abolished the formalistic inquiry whether the tax is *on* a distinct interest," 103 S.Ct. at 3377 (emphasis in original), the appellee taxing authorities and their supporting amici persist in debating among themselves the question of whether federal obligations may be found in net worth after a proportionate deduction is applied. *See, e.g.*, Brief for Appellees, at 6-10.[8] Their continuation of the quest ignores the fact that Congress' very purpose in amending Rev. Stat. § 3701 in 1959 was to put an end to such semantic gamesmanship.[9] Once it is concluded, as it must be, that federal obligations are "considered" in the "computation" of Georgia's bank share tax as now construed, the question of what the tax is "on" is wholly immaterial.

[7] 73 Stat. 112 (codified at 26 U.S.C. §§ 801-20).

[8] Appellees do not respond at all to appellant's point that even the Georgia Supreme Court's proportionate deduction continues to burden federal obligations with an allocated portion of state tax liabilities. *See* Brief of Appellant, at 21.

V. The Legislative History of the Life Insurance Company Income Tax Act of 1959 Is Not Relevant To the Interpretation of Rev. Stat. § 3701.

As a part of their effort to show that Congress would not have considered a tax *on* net assets, reduced by a proportionate deduction, as burdening federal obligations, appellees and their amici seek support in the legislative history of the Life Insurance Company Income Tax Act of 1959 ("LICITA"). They argue that because the 1959 amendment to Rev. Stat. § 3701 and LICITA were passed nearly contemporaneously, the legislative history of the latter should be used in interpreting the words of the former. The argument is based on the observation in *United States v. American Building Maintenance Industries*, 422 U.S. 271, 277 (1975), that when a Congress enacts two statutes "designed to deal with closely related aspects of the same problem," the statutes should be construed with reference to each other.[10] Brief for Appellees, at 14-15.

[9] *See, e.g.*, Hearings, at 71 ("The Treasury and the Department of Justice have felt that the position of the State of Idaho rests upon a distinction of words which is without substance. We have not, however, been able to persuade the Idaho authorities to change their position").

[10] The *American Building Maintenance* decision recognized, however, that the principle of construction urged must yield to the meaning of the words Congress used in the statute at issue. The Court ultimately held there that the words "engaged in commerce," as used in Section 7 of the Clayton Act, 38 Stat. 731, as amended, did not have the same meaning as the words "in commerce" as used by the same Congress in Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, 38 Stat. 719, as amended, even though both statutes dealt with the protection of competition.

LICITA and the 1959 amendment to Rev. Stat. § 3701 did not deal "with closely related aspects of the same problem." LICITA dealt with how to go about *imposing* a greater share of the federal income tax burden on life insurance companies.[11] The amendment to Rev. Stat. § 3701, by contrast, was addressed to *relieving* federal obligations from an undesired state burden. There is nothing, moreover, in the legislative history of either enactment to indicate any relationship between Rev. Stat. § 3701 and LICITA.[12]

The principle of construction on which appellees rely is properly applied, moreover, when two contemporaneous statutes share common language. LICITA and the 1959 amendment to Rev. Stat. § 3701 do not share common language. The former expressly authorizes a deduction based on allocation; the latter not only omits any reference to the concept of allocation, but also employs language that is "inconsistent with implied exceptions." *American Bank*, 103 S.Ct. at 3375. The appellees' suggestion that the legislative history of LICITA infuses amended Rev. Stat. § 3701 with a meaning which is implicity contradicted by the plain words of the 1959 amendment thus cannot be supported by the rule of *American Building Maintenance*.

The most accurate observation that can be made about the relative contemporaneity of LICITA and the 1959 amendment to Rev. Stat. § 3701 is that Congress made different decisions about the kind and degree of immunity

[11] *See* S. Rep. No. 291, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 1575, 1577-78.

[12] If any inference at all is to be drawn from the relative contemporaneity of LICITA and the 1959 amendment to Rev. Stat. § 3701, it should be that Congress knew how to create a deduction based on an allocation method but by omitting authorization for such a special deduction, intended to reject it.

to be given *municipal* bond income in the *federal taxation* of insurance companies and the kind and degree of immunity to be given *federal* obligations under *state taxation* systems. Appellees' resort to LICITA is no more instructive than the similar "tour of the history of an entirely different statute, Rev. Stat. § 5219" on which the respondents in *American Bank* embarked. *American Bank*, 103 S. Ct. at 3377.

VI. The Taxing Authorities' Arguments Should Be Addressed To Congress, Not the Court.

The appellee taxing authorities and their supporting amici argue that because banks have no incentive to purchase federal obligations past the point at which the federal securities they already hold exceed net worth, the complete exclusion of federal obligations fails, most of the time, to encourage banks to buy federal obligations. In a variation on that theme, they urge approval of a proportionate deduction because such a deduction is said to provide banks with at least some incentive to choose federal obligations every time a bank is considering possible investments.

These arguments should be addressed to Congress, not the Court.[13] Rev. Stat. § 3701, as amended, makes no exception for state taxes that only partially impact federal obligations (those imposed up to the point at which federal obligations equal net worth). The statute does not sanction taxes that afford federal obligations only some degree of immunity (those which would confer proportionate

[13] "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvements." *Badaracco v. Commissioner of Internal Revenue*, 104 S.Ct. 756, 764 (1984). "The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not. . . ." *Griffin v. Oceanic Contractors, Inc.*, 102 S.Ct. 3245, 3253 (1982).

exemption). Instead, the statute reflects the judgment of Congress, made in the context of repeated state efforts to circumvent the pre-1959 version of Rev. Stat. § 3701, that any state tax should be forbidden if such tax considers federal obligations, directly or indirectly, in the computation thereof.

The taxing authorities' arguments also lose sight of the fact that Rev. Stat. § 3701 was not enacted and amended so as to affect only bank share taxes. To reach the result they desire, appellees and their amici would apparently have the Court carve out a special denial of the exemption for bank share taxes. The language of Rev. Stat. § 3701 ("[t]his exemption extends to every form of taxation . . .") is inconsistent with such an approach. The Court rejected a similar theory advanced by the lower court in *American Bank*, observing that the "approach would ascribe to Congress the implausible intention to outlaw consideration of federal obligations in computing all taxes on shareholders, except taxes on shareholders of banks." *American Bank*, 103 S.Ct. at 3380 n. 15.

Because the language of the statute does not authorize peculiar treatment of banks or bank share taxes, the construction the appellees ask the Court to adopt would necessarily apply to all classes of taxpayers and all types of tax systems. Nothing in this case provides the Court with a basis for appraising the consequences of imposing such a sweeping limitation on the exemption. The consequences of so significant a limitation should be examined by Congress, and any change in the law should be made only after full hearings on the subject.

Finally, the taxing authorities and their supporting amici complain that requiring a complete exclusion would disrupt systems in various states under which banks are taxed. If so, the states have had more than adequate notice.

See Brief of Appellant, at 10-11, and the cases cited therein. The Court rejected an identical argument in its holding last term that a detrimental effect on state tax systems provided no occasion for disregarding the plain words of a statute:

> Amici point out that several states have taxation statutes similar to [Hawaii's tax on the gross income of airlines] and that the ability of those states to retain revenues collected from airlines during the past decade will be affected by our decision today. We acknowledge that our interpretation of § 1513(a) [of the federal Airport Development Acceleration Act] may result in the disruption of state systems of taxation; we are, however, bound by the plain language of the statute . . . . [W]e trust that Congress will amend § 1513(a) if it concludes, upon reconsideration, that the preemptive sweep of the current version is too great.

Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 104 S.Ct. 291, 295 n. 10 (1983). So, too, is appellees' remedy here with Congress, not the Court.

CONCLUSION

For these reasons, the Court should reverse the decision of the Supreme Court of Georgia, and remand the cause with a direction that federal obligations be fully excluded from total assets, and thus from net worth, in computing the bank share tax base.

Respectfully submitted,

CHARLES T. ZINK
L. TRAMMELL NEWTON, JR.
HANSELL & POST
3300 First Atlanta Tower
Atlanta, Georgia 30383-3101
(404) 581-8000

October 23, 1984